(3) Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MIGUEL RICHARDSON,
Petitioner,

v.

GARY L. JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI VOLUME II, PAGES 296-486

THIS IS A CAPITAL CASE

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192RD

Texas Code of Criminal Procedure Article 37.071 (in effect in 1981)

Art. 37.071. Procedure in capital case

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

Art. 35.22. Oath to jury

When the jury has been selected, the following oath shall be administered them by the court or under its direction: "You and each of you do solemnly swear that in the case of the State of Texas against the defendant, you will a true verdict render according to the law and the evidence, so help you God".

Art. 35.16. [616] [692] [673] Reasons for challenge for cause

(a) A challenge for cause is an objection made to a particular juror, alleging some fact which renders him incapable or unfit to serve on the jury. A challenge for cause may be made by either the state or the defense for any one of the following reasons:

1. That he is not a qualified voter in the state and county under the Constitution and laws of the state; provided, however, the failure to register to vote shall not be a disqualification;

2. That he has been convicted of theft or any felony;

3. That he is under indictment or other legal accusation for theft or any felony;

4. That he is insane;

5. That he has such defect in the organs of feeling or hearing, or such bodily or mental defect or disease as to render him unfit for jury service, or that he is legally blind and the court in its discretion is not satisfied that he is fit for jury service in that particular case;

6. That he is a witness in the case;

7. That he served on the grand jury which found the indictment;

8. That he served on a petit jury in a former trial of the same case;

9. That he has a bias or prejudice in favor of or against the defendant;

10. That from hearsay, or otherwise, there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as would influence him in his action in finding a verdict. To ascertain whether this cause of challenge exists, the juror shall first be asked whether, in his opinion, the conclusion so established will influence his verdict. If he answers in the affirmative, he shall be discharged without further interrogation by either party or the court. If he answers in the negative, he shall be further examined as to how his conclusion was formed, and the extent to which it will affect his action; and, if it appears to have been formed from reading newspaper accounts, communications, statements or reports or mere rumor or hearsay, and if the juror states that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case. If the court, in its discretion, is not satisfied that he is impartial, the juror shall be discharged;

11. That he cannot read or write.

DEFENDANT'S SPECIAL REQUEST
CHARGE ON PUNISHMENT ON NO. 1

NO. 81-CR-1548

THE STATE OF TEXAS	IN THE DISTRICT COURT
VS.	175TH JUDICIAL DISTRICT
MIGUEL A. RICHARDSON	BEXAR COUNTY, TEXAS

DEFENDANT'S SPECIAL REQUESTED
CHARGE ON PUNISHMENT NO. ONE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW MIGUEL A. RICHARDSON, defendant in the above styled and numbered cause, and pursuant to Article 36.15, code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the Jury as follows:

"You are instructed that any evidence which, in your opinion, mitigates against the imposition of the Death Penalty, including any aspect of the Defendant's character of record, and any of the circumstances of the commission of the offense which have been admitted in evidence before you, may be sufficient to cause you to have a reasonable doubt as to whether or note the true answer to any of the Special Issue is "Yes"; and in the event such evidence does so cause you to

have such a reasonable doubt, you should answer the Issue 'No.'"

Respectfully submitted,

/s/ Allen Cazier
ALLEN CAZIER
Suite 1010 Main Plaza Bldg.
San Antonio, Texas 78205
(512) 225-6151

Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. One is illegible.

illegible
JUDGE PRESIDING

DEFENDANT'S SPECIAL REQUEST
CHARGE ON PUNISHMENT ON NO. TWO

NO. 81-CR-1548

THE STATE OF TEXAS	IN THE DISTRICT COURT
VS.	175TH JUDICIAL DISTRICT
MIGUEL A. RICHARDSON	BEXAR COUNTY, TEXAS

DEFENDANT'S SPECIAL REQUESTED
CHARGE ON PUNISHMENT NO. TWO

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW MIGUEL A. RICHARDSON, defendant in the above styled and numbered cause, and pursuant to Article 36.15, code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the Jury as follows:

"You are instructed that, in order to answer any of the Special Issues 'yes,' the Jury must believe unanimously, beyond a reasonable doubt, that the true answer to the Issue is 'Yes.' In order to answer any Issue 'No,' however, it is only necessary that ten of the jurors believe that the correct answer is 'No.' An answer of 'No' may be given to any of the Issues if:

"1) at least ten (10) jurors have a reasonable doubt as to whether or not the correct answer should be 'Yes'; or

"2) if at least ten (10) jurors find that mitigating factors against the imposition of the Death Penalty exist, either in regard to any aspect of the Defendant's character or record, or in regard to any of the circumstances of the commission of the offense which have been admitted in evidence before you; or

"3) if evidence of any such mitigating factors causes at least ten (10) jurors to have a reasonable doubt as to whether the true answer to the Issue is Yes.'"

Respectfully submitted,

/s/ Allen Cazier
ALLEN CAZIER
Suite 1010 Main Plaza Bldg.
San Antonio, Texas 78205
(512) 225-6151

Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. Two is denied.

illegible
JUDGE PRESIDING

DEFENDANT'S SPECIAL REQUEST
CHARGE ON PUNISHMENT ON NO. THREE

NO. 81-CR-1548

THE STATE OF TEXAS	IN THE DISTRICT COURT
VS.	175TH JUDICIAL DISTRICT
MIGUEL A. RICHARDSON	BEXAR COUNTY, TEXAS

DEFENDANT'S SPECIAL REQUESTED
CHARGE ON PUNISHMENT NO. THREE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW MIGUEL A. RICHARDSON, defendant in the above styled and numbered cause, and pursuant to Article 36.15, code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the Jury as follows:

"You are instructed that you may answer any of the Special Issues 'No' if you find any aspect of the Defendant's character or record or any of the circumstances

of the offense as factors which mitigate against the imposition of the death penalty."

Respectfully submitted,

/s/ Allen Cazier
ALLEN CAZIER
Suite 1010 Main Plaza Bldg.
San Antonio, Texas 78205
(512) 225-6151

Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. Three is denied.

illegible
JUDGE PRESIDING

DEFENDANT'S SPECIAL REQUEST
CHARGE ON PUNISHMENT ON NO. FOUR

NO. 81-CR-1548

THE STATE OF TEXAS	IN THE DISTRICT COURT
VS.	175TH JUDICIAL DISTRICT
MIGUEL A. RICHARDSON	BEXAR COUNTY, TEXAS

DEFENDANT'S SPECIAL REQUESTED
CHARGE ON PUNISHMENT NO. FOUR

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW MIGUEL A. RICHARDSON, defendant in the above styled and numbered cause, and pursuant to Article 36.15, code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the Jury as follows:

"You are instructed that you may answer Special Issue No. One 'No' if you find any aspect of the

Defendant's character or record as factors which mitigate against the imposition of the death penalty."

Respectfully submitted,

/s/ Allen Cazier
ALLEN CAZIER
Suite 1010 Main Plaza Bldg.
San Antonio, Texas 78205
(512) 225-6151

Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. Three is denied.

illegible
JUDGE PRESIDING

DEFENDANT'S SPECIAL REQUEST
CHARGE ON PUNISHMENT ON NO. FIVE

NO. 81-CR-1548

THE STATE OF TEXAS	IN THE DISTRICT COURT
VS.	175TH JUDICIAL DISTRICT
MIGUEL A. RICHARDSON	BEXAR COUNTY, TEXAS

DEFENDANT'S SPECIAL REQUESTED
CHARGE ON PUNISHMENT NO. FIVE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW MIGUEL A. RICHARDSON, defendant in the above styled and numbered cause, and pursuant to Article 36.15, code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the Jury as follows:

"You are instructed that you may answer Special Issue No. 2 'No' if you find any aspect of the

Defendant's character or record as factors which mitigate against the imposition of the death penalty."

Respectfully submitted,

/s/ Allen Cazier
ALLEN CAZIER
Suite 1010 Main Plaza Bldg.
San Antonio, Texas 78205
(512) 225-6151

Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. Three is denied.

illegible
JUDGE PRESIDING

DEFENDANT'S SPECIAL REQUEST
CHARGE ON PUNISHMENT ON NO. SIX

NO. 81-CR-1548

THE STATE OF TEXAS	IN THE DISTRICT COURT
VS.	175TH JUDICIAL DISTRICT
MIGUEL A. RICHARDSON	BEXAR COUNTY, TEXAS

DEFENDANT'S SPECIAL REQUESTED
CHARGE ON PUNISHMENT NO. SIX

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW MIGUEL A. RICHARDSON, defendant in the above styled and numbered cause, and pursuant to Article 36.15, code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the Jury as follows:

"During your deliberations as to the answers to be given to the special issues, you are not to consider how much of his sentence the Defendant would be required to serve before being released on parole, if his punishment is assessed at life imprisonment. You are instructed, however, that under the law, a person who is serving a sentence of life imprisonment for the offense of Capital Murder may not be

considered for release on parole until his actual calendar time served, without consideration of good conduct time, is twenty (20) years."

Respectfully submitted,

/s/ Allen Cazier
ALLEN CAZIER
Suite 1010 Main Plaza Bldg.
San Antonio, Texas 78205
(512) 225-6151

Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. Three is denied.

illegible
JUDGE PRESIDING

SUPPLEMENTAL CHARGE

NO. 81-CR-1548

THE STATE OF TEXAS	IN THE DISTRICT COURT
VS.	175TH JUDICIAL DISTRICT
MIGUEL A. RICHARDSON	BEXAR COUNTY, TEXAS

SUPPLEMENTAL CHARGE

MEMBERS OF THE JURY:

To answer either issue "yes" all twelve (12) jurors must agree beyond a reasonable doubt that the answer should be "yes."

To answer a question "no" as many as ten 910) jurors must agree that the answer should be "no."

Please continue your deliberations.

Respectfully submitted,

/s/ Preston H. Dial, Jr.
PRESTON H. DIAL, JR.
Judge Presiding

CHARGE OF THE COURT ON PUNISHMENT

NO. 81-CR-1548

THE STATE OF TEXAS	IN THE DISTRICT COURT
VS.	175TH JUDICIAL DISTRICT
MIGUEL A. RICHARDSON	BEXAR COUNTY, TEXAS

CHARGE OF THE COURT ON PUNISHMENT

MEMBERS OF THE JURY:

By your verdict returned in this case, you have found the Defendant guilty of capital murder, as alleged in the indictment. You are instructed that a sentence of life or death is mandatory upon conviction of a capital offense. It now becomes your duty to determine, from all the evidence in this case, the answers to certain questions which are called in this charge special issues, as follows:

SPECIAL ISSUE I

Was the conduct of the defendant that cause the death committed deliberately and with the reasonable expectation that the death of John G. Ebbert would result?

SPECIAL ISSUE II

Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

You will answer each of these special issues either "yes" or "no."

In order for the jury to answer a special issue "yes" the jurors must unanimously concur that the answer is "yes" beyond a reasonable doubt regarding that special issue.

Any juror who entertains a reasonable doubt that the answer is "yes" as to a special issue shall vote "no" in the jury deliberations regarding that special issue. If ten or more jurors vote "no" in the jury deliberations as to a special issue, then the answer of the jury is "no" regarding that special issue.

You are further instructed that in determining each of these special issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the trial of the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the special issues hereby submitted to you.

You are further instructed that if the jury returns an affirmative finding on each of the two Issues submitted, this Court shall sentence the defendant to death. If the jury returns a negative finding on any Issue submitted, the Court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight

to be given to the testimony, but you are bound to receive the law from the Court, which is herein given you, and be governed thereby.

Respectfully submitted,

/s/ Preston H. Dial, Jr.
PRESTON H. DIAL, JR.
Judge of the 175th Judicial District
Court of Bexar County, Texas

NO. 81-CR-1548

THE STATE OF TEXAS	IN THE DISTRICT COURT
VS.	175TH JUDICIAL DISTRICT
MIGUEL A. RICHARDSON	BEXAR COUNTY, TEXAS

VERDICT FORM

SPECIAL ISSUE I

Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, Miguel A. Richardson, that caused the death of the deceased was committee deliberately and with the reasonable expectation that the death of the deceased would result?

ANSWER: Yes

SPECIAL ISSUE II

Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Miguel A. Richardson, would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER: Yes

We, the Jury, return in open Court the above answers as our answers to the issues submitted to us and the same is our verdict in this case.

illegible
Foreman of the Jury

BY THE COURT:

Q. You are William Graves Noble?

A. That's right.

Q. Mr. Noble, in a trial such as this we divide the responsibilities for decision making between the Judge and the jury. The Judge has the responsibility of making decisions on legal questions or law questions and the jury makes the decision on the factual issues.

You do this by listening to the testimony of the witnesses, deciding which ones you believe, which ones you don't believe, how much you believe them and when the evidence is all over the jury goes in the jury room, deliberates on the issue, reaches a verdict either finding the Defendant guilty or not guilty.

And if he's found guilty you go to the punishment phase of the trial and you will get more evidence, go back into deliberation again, talk about it and answer the questions that we ask. This is what we mean by deliberating on the fact issues.

If a Defendant is found guilty of Capital Murder he must receive one of two mandatory punishments either life imprisonment or Death. My question to you, sir, is would your knowledge of the mandatory punishments of life imprisonment or Death effect your deliberation on any of the fact issues?

A. I'm not sure what you mean by the question.

THE COURT: I can ask it again but it's going to come out just about the same way.

THE WITNESS: Ask it again.

THE COURT: You understand what the mandatory punishments are?

A. Yes.

Q. You understand what I mean by deliberating on fact issues?

A. Yes.

Q. Would your knowledge of the mandatory punishment of life imprisonment or Death effect your deliberation on the fact issues?

A. I don't think so.

THE COURT: The State may inquire.

* * * * * *

ON BEHALF OF THE STATE

BY MR. BURRIS:

Q. Good morning, Mr. Noble.

A. Good morning.

Q. Following up on the question that Judge Dial just asked I'll ask another question that may be just as difficult in understanding, hopefully not. Do you have

conscientious scruples against the infliction of the Death Penalty in a Capital case?

A. Yes. I. do.

Q. All right. You are opposed to the Death Penalty?

A. I am.

Q. Is your opposition to the Death Penalty such that under no set of facts or circumstances could you ever sit as a juror in such a manner as the Death Penalty would be inflicted?

A. That's not easy to answer yes or not. I know and theoretically I realize society has to make rules to protect itself and it may be that the Death Penalty is a necessary part of those rules. Emotionally and spiritually I'm not so sure I could make the decision.

Q. All right. Well, I want to explore that just for a minute. I'll tell you right off the bat in this case the State is asking for the Death Penalty. If you are selected as a juror it could come to pass that the jurors would be required to make a determination in answering the two questions that we talked to you about yesterday as to whether or not the Death Penalty was going to be imposed.

Now, with your opinion about the Death Penalty, do you feel that you could not put yourself in that position to vote in such a manner as to cause infliction of the Death Penalty?

A. I do.

Q. Insofar as your opinion about the Death Penalty, are you irrevocably committed before trial to automatically voting against the Death Penalty regardless of the facts and circumstances that might come to light?

A. I feel I am. Yes, I have given it a lot of thought.

Q. Now, the two questions that would be asked of the jury at the second part of the trial. You know that the jury is not asked to give either a life sentence or the Death Penalty. What they do is answer two questions. Based upon the answers to those two questions the Judge will either give a life sentence or the Death Penalty.

The first question that is asked of the jury at the second part of the trial is whether the conduct of the Defendant that caused the death of the deceased was committed deliberately and with a reasonable expectation that the death of the deceased or another would result. In other words, did the Defendant commit the act deliberately.

And the jury would be asked to answer that question either yes it was deliberate or no it wasn't. The second question that would be asked the jury is whether there would be a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society.

The jury would be asked to answer either yes there is a probability that he would be a continuing threat to society or no. If the jury answers those two questions yes the Judge has no alternative but no impose the Death Penalty.

Now, is your opinion about the Death Penalty such that you would, regardless of the evidence, answer one

of those questions no in order to insure that the Death Penalty would not be imposed?

A. I think I would feel very uncomfortable about it because I would know that my decision would be involved in the ultimate decision.

Q. And regardless of the evidence your opinion about the Death Penalty would effect your answers to these questions?

A. I think it would.

MR. BURRIS: We'll go ahead and move for cause, Your Honor.

THE COURT: Are you challenging for cause at this time?

MR. BURRIS: Yes.

THE COURT: All right. Mr. Noble, you would be instructed as to the law and you would be told that if you believed a certain set of facts beyond a reasonable doubt then you should answer it one way or the other. If you believe it beyond a reasonable double you are to answer it yes. If you do not believe it beyond a reasonable doubt you would answer it no.

And you would take an oath that you would render a verdict based on the law and the evidence and instructed. My question is, is your feeling about the Death Penalty so strong that you would not be able to follow your oath as a juror and base your verdict on the evidence as you believe it to be?

THE WITNESS: Well, I think I would have to wrestle long and hard with the oath for sure.

THE COURT: I understand that.

THE WITNESS: But I feel opposed to the Death Penalty and I think it would have an effect on my decision.

THE COURT: All right. Now, I understand that you say it would effect it and we are going to have to push you a little farther than that. My question is, you know, a juror takes an oath that you will render a true verdict according to the law and the evidence.

The law is that if you believe the evidence beyond a reasonable doubt that you would answer, you would find a defendant guilty and you would answer the issues affirmatively if you find the evidence to be that way. That is what the oath is. And so I'm asking you now, would you be able to follow that oath?

THE WITNESS: Well, Your Honor, I would follow the oath. I think I would have to do that. I wouldn't feel very comfortable about doing it.

THE COURT: I can appreciate that and I will overrule the challenge.

* * * * * *

ON BEHALF OF THE STATE

BY MR. BURRIS:

Q. Mr. Noble, when was it in your life that you became opposed to the Death Penalty?

A. Well, I don't think I could –

Q. Was it since childhood or religious upbringing?

A. It is involved in my religious background, yes, but I couldn't say at any specific time or date I became opposed to it. I think it's something that just kind of grew. I have a son-in-law in ministry and he has had some effect on my thinking.

Q. All right. Now, you realize that if you are selected as a juror in this case and the Defendant is found guilty you are going to be called upon to answer those two questions?

A. Uh-huh.

Q. Can you assure me that you will answer those two questions based upon the evidence that you hear in the case?

MR. CAZIER: Objection. The prosecutor is undertaking to commit the juror to a commitment in this particular case. I object to it.

THE COURT: You may not ask what his answer will be, but if he will base it on the evidence. The objection is overruled.

ON BEHALF OF THE STATE

BY MR. BURRIS:

Q. Can you assure me that you will answer those two questions based upon the evidence that you hear in the case?

A. Well, if I said, no I would be contradicting the answer I gave Judge Dial. I would have to.

Q. I'm not asking you to not contradict yourself or to contradict yourself, I'm asking you just to tell me just as honestly as you can so that I will know whether or not you can sit here as a fair and unbiased juror and do the job that the jurors must do?

A. If I were a juror I would try to serve to the best of my ability. That's what I can say.

Q. All right.

A. You used a couple of words there, bias and impartial that I think you might want to pursue.

Q. Well, are you biased in some manner about this case?

A. Well, I have read quite a bit about it. And I feel that I have already prejudged the case. I mean I take all the newspapers. I'm a journalist by profession and I know – I don't disregard what I see in the paper.

THE COURT: Have you already formed an opinion as to the guilt or innocence?

THE WITNESS: Yes, Your Honor. I think it's only fair that I say that I have formed an opinion.

THE COURT: You will be excused Mr. Noble. You can return to the Central Jury Room. They will discharge you from there.

* * * * * *

MR. CAZIER: If the Court please, the Defendant objects to Mr. Noble being excused, the entire predicate not having been laid for his excuse.

THE COURT: You are excused.

* * * * * *

THE COURT: The statute provides if the juror states from hearsay or otherwise he has already formed an opinion as to the guilt or innocence of the Defendant there will be no further questioning.

MR. CAZIER: Does it say one more sentence?

THE COURT: Can you do one in ten minutes?

MR. WILLIAMS: No, sir.

MR. CAZIER: I would say that we—

THE COURT: Mr. Williams says no. I'm accept that. Let's recess until 1:30, gentlemen.

RECESS

the witness, after having been first cautioned and duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

• • • • •

Please.

THE COURT: Please be seated.

DIRECT EXAMINIATION

ON BEHALF OF THE DEFENDANT

BY MR. CAZIER:

Q. What is your name, ma'am?

A. Lillie Rex.

Q. Where are you from, Mrs. Rex?

A . Oklahoma City.

Q. How old are you?

A. Sixty-five.

Q. Are you married or single?

A. Yes. I'm married.

Q. Where do you live in Oklahoma City?

A. 1117 Northeast thirty-eighth.

Q. Do you know Miguel A. Richardson?

A. Yes. I do.

Q. How long have you known him?

A. About twenty years.

Q. When did you first come to know him?

A. Oh, his family and I all belonged to the same church.

Q. All right. Did you come to know Miguel and his family at church?

A. Yes.

Q. Were you a Sunday school teacher?

A. Yes.

Q. Are you still a Sunday school teacher?

A. No. Not now.

Q. Did you come to know Miguel Richardson in connection with your teaching Sunday School?

A. Right. Well, before then, but he finally came to my class, you know.

Q. All right. Was he a good student?

A. Yes. He was.

Q. What did Miguel do there at church as far as his activities in connection with the church?

A. Oh, he was a Walter Lee. You know, in our church the youngsters, they call it the Walter Lee. All the way down the line until he was a teenager he was a Walter Lee.

Q. Did he have trouble getting along with the other kids when he was at church?

A. Not that I know of.

Q. Okay.

A. Just the usual, you know, kids.

Q. Was he faithful about coming to Sunday school?

A. Yes, he was.

Q. Did the other Richardson children come?

A. All of them. Yes.

Q. Do you know his parents and brothers and sisters?

A. Yes.

Q. Have you stayed in touch with Miguel over the past years?

A. Until he was a grown man and left home.

Q. Did you folks have some problems with integration there in Oklahoma City whenever Miguel was in his last years in high school?

A. Oh, yeah. It was nation wide. I'm sure everyone heard about it.

Q. What problems in particular did you have there in Oklahoma City?

A. Well, integrating in school, what have you, sanitary deal.

Q. Sanitary workmen's strike?

A. Yes.

Q. Was there a lot of racial controversy there in Oklahoma during that time?

A. Oh, yes.

Q. Was Miguel Richardson one of the black students that integrated to a white school?

A. Yes. All the children there were integrated into the white school.

Q. Did you people there at the church in particular have occasion to counsel with and work with Miguel Richardson and the other students in connection with integration?

A. Yes.

MR. CAZIER: Thank you, Miss Rex.

Pass the witness.

* * * * *

MR. BURRIS: I don't have any questions.

THE COURT: You are excused, ma'am. Thank you very much.

* * * * *

MR. CAZIER: Pastor Kabelitz.

THE COURT: Would you please be sworn.

THE WITNESS: Yes, sir.

WHEREUPON,

NORB KABELITZ

the witness, after having been first cautioned and duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

• • • • •

DIRECT EXAMIMATION

ON BEHALF OF THE DEFENDANT

BY MR. CAZIER:

Q. What is your name, sir?

A. Pastor Norb Kabelitz.

Q. Spell your last name?

A. K-A-B-E-L-I-T-Z.

Q. You are a pastor at what church?

A. Redemer Lutheran Church, Oklahoma City.

Q. How long have you been at that church?

A. I have been there since October 1966, fifteen years.

Q. All right. What educational qualifications and experiences do you have to qualify you to be a pastor?

A. I have four years of college. I have four years of university, three years of post graduate work, and I was recently given an honorary doctorate from the seminary.

Q. Do you know the Defendant in this case, Miguel Antonio Richardson?

A. Yes, sir.

Q. Do you know his parents?

A. Yes.

Q. Do you know his brothers and sisters?

A. Yes.

Q. How long have you known him?

A. I have known them since I had come to Oklahoma City at the time when Miguel was eleven years old.

Q. How did you come to know Miguel Richardson?

A. As pastor, and my first experience with Miguel would have been the first program for the church and first programs for communion classes, which my daughter was also a part, and about ten of them in Miguel's group as we

began to prepare them for their first communion, and also later on for the confirmation classes.

I was able to observe him, the dynamics of his relationships with the others. I was able to help him in the learning process. I noticed one disability that he had that we had to cop with constantly, that he wasn't able to read very well. And this effected self image and the peer relationships.

We sought to overcome that by providing visual improvements leading to his support. Even there, because some of the others suffered with that, and we had a good group that year. It was a little pioneer group for the parrish, my first time. There being white being in a black community created it's on dynamics and the parrish. The philosophy redeemer that we unpacked in both our celebration and in our message that was going to be a community that would be a bridge between black and white, between controversial issues, and we were going to be the bridge, that would weld where ever possible, the community together. And therefore the environment in which we grew in the 60's, all the young people that grew up in the 60's is the struggling group that I like to observe, and as I reflect now and I see people who have come out of the 60's and early 70's. We have lost forty percent of them because of the controversy through which this nation was going. Now it hit Oklahoma City on two major issues.

Q. Before we get into that, pastor, let me get into a little more about your person to person relationship.

MR. BURRIS: I don't like for him interrupting the witness. I was very interested in what he was having to say.

MR. CAZIER: Please do.

THE COURT: You may restate your question.

MR. CAZIER: I withdraw that question. Please continue with your answer.

THE WITNESS: Miguel is part of the melee and I'm trying to describe the context in which my relationship with Miguel, the parrish, the community which Miguel was a part as he watched it you unfold. I think it places a very important role as to what has gone on in this young man's life.

The two major issues that confronted the city, of course, were desegregation. Oklahoma was a locked in segregated city. I served as a member of the 36th Advisory Citizen Panel, that over the years spelled out how we would begin to make Oklahoma City a first class American city where no American would be discriminated on the basis of color where people would once and for all learn how to begin to live together under a law and justice.

ON BEHALF OF THE DEFENDANT

BY MR. CAZIER:

Q. What part did you play in actually play in the integration of schools there?

A. I was one part of the major committee that made recommendations to the school board.

Q. Did you actually have occasion to patrol the hallways of the schools?

A. Yes, sir. This came about when the conflict emerged and Oklahoma City schools desegregated. Conflict, particularly in one of the schools where you had a particular

strong sentiment in the city that was opposed to carrying out the law and where parents had deliberately set a blaze emotions and feelings with burnings at night, rallies, name calling picked up by the TV broadcasts throughout the city, which then was reflected in the kids in the school, and you had a black-white confrontation in the school of which Miguel was part there at that particular school.

Q. If you would focus yourself on Miguel's part?

A. Pardon?

Q. Focus yourself on Miguel's part and his role or activities in connection with that school in that integration problem.

A. Okay. I need to back up then, because here we are dealing with young black people who are forced to a setting of hostility, and Miguel has been learning from church, hey, we are meant to be a bridge here. Sacrifice. That means you kind of back down and absorb some of the name calling, overcome your ability to call me names by my ability to absorb that.

That's difficult for young people to understand. Especially young people who are gaining an identity trying to sift what is right and what is wrong and seeing good people shot down. Seeing his own pastor mistreated, abused, life threatened, the church bombed. Our church was firebombed, nearly destroyed in this melee.

Finally, then seeing even resolution of it. I see Miguel seeing that while people talk about what is right and wrong, he doesn't see much of it happening coming at him from society. That what is right and what is wrong. That system and those rules don't necessarily hold when you get out into the real life, and almost put a drift. You have to find

your own way. I saw Miguel from observing him working his way through that problem making some bad mistakes occasionally, constantly working through them.

Q. How often would you see him during this time period?

A. The period I'm describing I would see him just about every Sunday because the period I'm describing is period from eleven years old to about sixteen. And then we run into the problem that I described in the school that he was having. You can understand. Well, you might say if the law isn't that important for the people out there, then all authority figures, teachers create a dilemma in my mind. What is right? He doesn't stick up for what is right, etcetera. That creates confusion ethical dilemma.

I see Miguel immediately falling into a pattern. Now, if I'm going to make it I will have to keep my own world of values to hold on to, what I am and to be somebody. You could just see the thing unfold. It's very dangerous, could be very creative, but a very dangerous thing unless you know really what is happening, because in this type of a situation you can be used by outside forces, forced into channels and ways that you need not necessarily have wanted to go in the first place.

Q. Pastor, let me ask you this. In the earlier days was Miguel a well behaved child?

A. As normally well behaved as any of my others. Yes. Part of the youth group, the support group of the church. He played a role an acrolyte in the church, communion. Sometimes not wanting to go to church like some kids do, etcetera, but he was there.

Q. Was his father a strict disciplinarian?

A. Yes.

Q. Did you have occasion to visit in the home?

A. Yes, often.

Q. Okay.

A. They meant the best for their children. The family from which Miguel comes is a well put together family, very strong father image. A mother who tried to do the best for their children. Middle class you might call them, hard working. He's at Tinker Air Force Base. The mother a homemaker and now working for a National Transportation Company.

Miguel's Mother is a National church leader in the Lutheran church. She represents now the National A.B.L.C. on immigration service. She has been to Taiwan and seen suffering and pain in the world, and brings back those feelings into the homes, so they are sensitivity to raw, human need and injustice out there.

She has been a leading figure in the role of women in the church, played National leadership roles, spoken to National assemblies. She is real articulate and well done, has enabled people to cop with that part of their lives that would have been oppressed. That is the family out of which they emerge.

Q. Let me ask you this. Here in the late 60s, 1970 in Oklahoma City, this racial conflict. How did that effect Miguel's behavior?

A. I think I indicated that creates confusion in young people's minds. They see the law saying one thing and they see people's faces on television representing community

and the people saying other things disrupting the respect for love, what they do with "society's rules".

Q. Did you see Miguel at that time becoming aggressive, tending towards violence; did you see that?

A. No. He was not tending towards violence, but he had begun to question the values of "society" and as I tried to indicate for better or for worse in his own mind determining that for my own survival that he would set out to create a world of his own in which he could survive, in which he could be somebody, his own man, cope with the ambivalence that is out there.

I know for sure this was going through his mind, all this was in the mind of his peers. Miguel is not the best person to be able to share his feelings. He's kind of closed. This doesn't mean a lot of stuff isn't happening, inside. He knows what is happening out there, and I could understand what happens in young people's minds when confusion now occurs.

Here is good guys trying to do what is right and they get put down, you know. Then he sees other people in society obviously doing wrong who have respectable positions, and get by with it. How do you deal with this kind of life into which now young people have to survive? I'm trying to describe a feeling that I perceived Miguel struggling with. That's the word that I want to use.

Q. Now, wasn't his last year of high school that he -- I think he left home, dropped out of school?

A. It would have been his last year in high school. He had gone to three of them. Remember, we are in the black-white thing right now. The first high school that he went to I think only twelve of the black community went, so

that's the eastern part of the city, Dale City. There you had in the beginning of desegregation and in desegregation certain authority figures that didn't like what was happening would communicate that either explicitly or implicitly to some of the black students in the class.

Q. Now, did Miguel --

A. Miguel was in that class.

Q. Did he do this with his fellow students or with the teachers?

A. Primarily with the teachers. He was able to make it with his peer group in this particular setting. They liked him. At other times when authority figures though put him down publicly in class, called names, innuendos, the anger begins to rise up.

Q. You know his younger sister, Paquita?

A. Yes. Oh, yes.

Q. Paquita, was she better accepted by her fellow students or teachers or do you know?

A. I think by that time Paquita was in a different setting, but well accepted by her peers and was able to cope better with the teachers. She may have had a different set of teachers because it only takes one bad teacher to set off a whole set of feelings, both against an institution and maybe against even black people.

Q. Sometime shortly after leaving home, dropping out of school, Miguel gets in trouble and goes to prison.

A. Right. I'm familiar with the incident.

Q. You are familiar with that incident. It involved a welfare check I think?

A. That's right.

Q. You continued to correspond and communicate with Miguel Richardson?

A. Yes. We had exchanges of letters and continued to keep him on the mailing list. I received several communications from Miguel and noticed a change of attitude and understanding, maybe about how you cope with the evil that is in the world. The gospel itself reminds us the way you deal with it. It is overcome evil with good. That's a difficult thing to understand which coasts one on across to perform, which young people have such a difficult time absorbing because it seems awkward.

Miguel was beginning to understand and pickup. I sensed that in the way he responded to what he saw as my ministry in the community, which is very risky because my life was on the line constantly and, I sensed Miguel had a certain respect. Hey, if that white man can do it, why --he was beginning to understand more, and I sensed that from the correspondence, and he never did before. It's a growth pattern that I began to observe a glimmer of light. Hey, maybe this is the beginning of a radical understanding of what our life is meant to be as God's people in the world, and in encouraged him to hang in there.

Q. Pastor, when is the last time before coming to San Antonio that you personally saw Miguel Richardson?

A. This would have been at the communion table, November of 1978. This would have been at a time when the whole Richardson family were involved, too in doing a specific family project for the parrish. This had to do with

debt reduction eliminating some Thirty Thousand Dollars of debt so we could be debt free and become a self supporting parrish.

Up until this time we had been receiving support and the Richardson family very creatively presented a kind of entertainment fashion show which Miguel was the master of ceremonies. He did a really neat job. The parishioners were present at this little fashion show and they thoroughly enjoyed the presentation. I still remember Miguel's words, and it kind of rung a bell with me because he was encouraging them to see themselves in their best light which had to do finally with self image, how you see yourself. That told me, hey, Miguel is still struggling with this one and he's finally going to come clean with it so he can be sure of who he is, so that events and what people think out there wouldn't get hold and control him and what he did and his behavior.

Q. In connection with this fashion show and other times that you have had occasion to observe Miguel, tell us, if you would, your observations of his relationship with women of his own age?

A. In the initial period from the confirmation period class time, adolescence, growing up period as he went into high school he had a personality in a way of dealing with people that was open and attractive. And he is a good looking lad and girls found him attractive and were attracted to him. I have evidence that they would even come from long distances. A little girl in Colorado who really took his side, friended him, understood the struggle he was going through and came all the way to Oklahoma City and taken into the Richardson home. And befriended by the parrish, etcetera, but it was also interesting at the fashion show that some of the young girls in the community were there strangers to me but they were there obviously because, hey, Miguel was here.

They were drawn to him. They were fascinated, attracted to him. You will have to ask the girls that question, but they were there.

Q. Have you continued to correspond with Miguel up to the present time?

A. He has been receiving communications. Yes, from me up until this time. That's right.

Q. Okay.

A. At least the church mail. This is what I'm saying right now. I have not been able to individually send personal things as much as I would like to.

Q. When he was in jail in Denver did you write back and forth?

A. We wrote not a lot, but he wrote and we answered, yes.

Q. In the course of you knowing Miguel Richardson when he was growing up in your church and later on, did you become familiar with his talents as an artist?

A. Yes. The whole Richardson family has artists in the family, and I was really amazed and also pleasurably surprised. We have an annual art festival at the parrish. He would send back some of his drawings which had to do with particularly religion, Christian art.

I was particularly interested in some of the things he was beginning to pickup and how he was beginning to express himself in this. As I indicated verbally, Miguel has struggled to articulate well with words. He's learning that. His poetry that I have in my hand and stuff that he sends

indicates that a growing ability to express feelings and words, that he finds it difficult to express to people in conversation, etcetera. Art becomes the vehicle of expression of crystallizing inside yourself what is happening inside as you understand what is going on.

Q. Generally what is the theme of this art work?

A. I was particularly interested in the way he handles crucifix themes, suffering, pain, and how he has learned that the God that we own and that we love is able to cope and deal with pain. That is the hard lesson that came out of the 60's, the whole movement.

I began to see he was beginning to learn the way to deal with that mess out in the world. It is not just to turn your back on it or to take a drug trip and run from it, but to move back into it and spend something of yourself dealing with it, carrying for it, redeeming it.

This is the way I was interpreting the art, and I think some of our conversation with the mother when she brought the pieces for display indicated that and entered in some of the themes he was picking up.

Q. Let me go back to this earlier days when he was in your school there. Did you bring a photograph with you?

A. Yeah, I did. I wanted to see the peer group that was in that group and this is the group that he grew up in. This goes back to 68,69.

MR. CAZIER: I'll ask the Court Reporter to mark this.

WHEREUPON, at this time, Defendant's Exhibit DD is marked for identification purposes.

ON BEHALF OF THE DEFENDANT

BY MR. CAZIER:

Q. Let me hand you what the Court reporter has marked as Defendant's Exhibit DD and ask you if this is a photograph of that first communion class back in 68?

A. This is 68, yes, sir. The whole class.

Q. Does it fairly and accurately represent a picture of the students and yourself there inside the church?

A. Yes, It does.

Q. All right. And as is Miguel pictured there?

A. Miguel is the central figure in the front.

MR. CAZIER: We offer Defendant's Exhibit DD, Your Honor, and tender the same to counsel.

MR. BURRIS: Your Honor, this is no more relevant than the picture of the deceased, Mr. John Ebbert that I tried to introduce into evidence. I'm going to object to it on grounds of relevancy.

THE COURT: Overruled. Defendant's Exhibit DD will be received into evidence.

WHEREUPON at this time, Defendant's Exhibit DD was admitted into evidence.

ON BEHALF OF THE DEFENDANT

BY MR. CAZIER:

Q. Now, that is Miguel Richardson, the young man in the middle on the front row there with the smile on his face?

A. Yes. Right in the center.

Q. Who are some of the other students there?

A. Laura Jones, my daughter, Jody. That's Karen. She's now in Germany. Her husband -- I mean her father is a service man. Fal Jones, Julio, his brother. That's Leonardo Green, Donald Green, Leonardo Smith. That's my other daughter Lynn. Lynella. These two are the Miller sisters. Shella and Carroll.

Q. Now, some of these former students have done well and some have done very badly, have they not?

A. That's right.

Q. One of the former students pictured here became involved in drugs and is now dead?

A. He was murdered by the drug ring for using it.

Q. Another is an educator?

A. That's right.

Q. So they have gone to both extremes?

A. There was a nurse, both extremes coming out of this melee. This is why I was reflecting as I viewed the parrish records. The kids that came out of this peer group I was trying to ask myself a question why forty percent

seemingly dropped out, washed by the wayside, became effective in society or trying to rebuild their lives.

The only answers that I have is the confusion of that era in which they saw a whole society just rip a part, what was right and finding themselves in a fog out there trying to find their way, and fortunately some come clean with the answer, finally, and discover what it was all about, why we were in their struggling, why the parents were in there struggling, and I'm seeing that turn around in some of the stories, even as I could tell their life story here, everyone of those to be black and in a predominantly white community is a struggle in itself.

And then to be a parrish that is applying this kind of key role is in itself a struggle. And yet the city has held up. Redemer Lutheran Church is one of the most constructive communities in the whole city. The Mayor, who has been there ten years has said this publicly, even after we are firebombed, the city came to my rescue, guarded my life constantly when I was threatened and just growing up in that kind of an atmosphere you can understand what this does. What am I going to do with my life out there.

Q. Do you have another poem there of Mr. Richardson's?

A. This would illustrate I think, and I said Miguel was poor in words. The guy has grown fantastically in articulating. What I have been saying, and what now he is seeing and committed himself to over the past two years. I have seen the change, the way to cope with that mess out there is to care. Martin Luther King once said, "I'll deal with your ability to mess me up with my ability to absorb it, to take it and still care about what happens to the world out there" and that takes guts. That takes a deep, commitment. That

takes some savvy, some understanding and recognition, and what that cross story was all about. It's the kind of world we are in. I would like to read just some of it just to let you see what the sounds were.

Q. As I was telling Miguel, the poem is already in evidence and we are not permitted to read something that is already in evidence.

A. It's fantastic as he spells out what's out there and comes up finally with the answer. It's a suffering God that is able to cope with that and that finally makes us triumphant and sets us free with having to be defensive. It sets us free from having to be vengeful. That sets us free maybe for doing some good in society, spending ourselves, expending ourselves, once again picking up hurting people and helping. That is the direction in which I have seen this whole pattern go.

I believe Miguel. I trust him, and I know as much as this jury does, and I know as much as the audience does, the circumstances unhappily have impacted his life when he got involved in -- even after seeing that, I as pastor fifteen years knowing him and the pain of people and the troubles of life out there I believe him.

MR. CAZIER: Thank you. Pass the witness, Your Honor.

* * * * *

THE COURT: Any cross-examination?

CROSS EXAMINATION

ON BEHALF OF THE STATE

BY MR. BURRIS:

Q. Reverend.

A. Yes, sir.

Q. What is all of the information that you

I would have mixed feelings about whether the Death Penalty itself deters crime. I myself and the statistics that I see and what I see in the community it does not, but I do see and I have ministered in El Reno Prison, ministry where you have outside people who care who come in and do something meaningful. Lifes get changed and you have a chain of events happening inside prison walls that create prison ministry that can only be positive, constructive good that I can verify from testimony and years and years of pastoral experience, and I would bet my life on it.

Q. Would you bet everybody else's life on it?

A. I don't know whether I would buy into that one. I have no comment. I would bet my life on it. I can't make that decision for you.

Q. You tell us, Reverend, that the prison setting develops a community ministry and that here over the last two and a half or three years you have seen the changes come over Miguel Richardson; is that correct?

A. I would say that I have seen pieces of light and evidence that Miguel is understanding things that he never adequately understood before. Yes, and that this was producing changes in his own mind, wanting to develop a kind of a macho image of his own for himself. He couldn't get it any other way. This way maybe. I have never seen him, though this is a normal pattern of, if I'm blocked here, then maybe here because he saw that it worked elsewhere. He saw other people surviving that way.

Those ever are the problems that I was referring to, the mistakes, lining up wrong relationships, thinking that they were going to be a solution where in fact they were going to be a dead-end. We could stand by only in pain to see this happen and hope that in the process Miguel would discover for himself really the see secret of what does it mean to be a man, and I'm convinced that he's very close to that right now.

MR. BURRIS: I don't believe I have any more questions.

MR. CAZIER: No further questions.

THE COURT: You are excused, sir. Thank you very much.

* * * * *

MR. CAZIER: We have one more very short witness.

THE COURT: Call him, quickly.

MR. CAZIER: Wayne Bernard.

THE COURT: Be sworn, please.

WHEREUPON,

WAYNE BERNARD

the witness, after having been first cautioned and duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

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DIRECT EXAMINATION

ON BEHALF OF THE DEFENDANT

BY MR. CAZIER:

Q. What is your name, sir?

A. Wayne Bernard.

Q. What is your business or profession?

A. I'm minister of the Randolph Church of Christ in Universal City.

Q. How long have you held that position?

A. Approximately a year and a half.

Q. What are your educational qualifications or experiences to hold that position?

A. I have B.A. from Abilene Christian University. I'm presently working on a specialist Masters Degree in marriage and family therapy.

Q. Do you know Miguel Richardson?

A. I do.

Q. How long have you known him?

A. For approximately six months.

Q. Since March of this year. How often have you seen him?

A. I see Miguel at least once a week within the jail. I serve as a volunteer chaplain volunteering about twenty hours a week.

Q. Where in the jail do you see him?

A. Primarily in the chapel area itself, but also on his floor.

Q. Okay. What you do when the two of you are visiting together?

A. I hold a bible study and a service for the special management group every Friday, and ordinarily there are four to five men who come, but on special occasions, special to me, Miguel was the only one, and we are able to share privately in the study of God's word.

Miguel has been interested in the word of God and we have been studying for seven months and it's more than just a visiting situation. Miguel asks questions and I answer them. He takes notes. It's obvious to me that he is very diligent in his study.

Q. Have you observed in the seven months that you have known him any change in his attitude?

A. Yes, I have.

Q. What have you observed?

A. When I first met Miguel in May I had no idea why he was in jail. I don't usually try to find out. We began studying the word. He had a lot of very specific questions about churches and about the Lord and about salvation. It was obvious to me he had already been doing a lot of thinking along that line.

We began studying, and then in May he was baptized within the jail. I think from that point especially forward I could see a real conversion within Miguel, and I think that is

evidenced by the fact that I have never seen any acts of violence, verbal or physical from him in the seven months I have known him. Six months.

Q. Did he participate in a course of Bible study, formal course that you offer?

A. Yes, he did.

Q. Is that a correspondence course?

A. Yes. They are. We have several correspondence courses that are offered to inmates and prisoners in the Texas Department of Corrections, and Miguel has taken part in those.

Q. Has he brought other fellow inmates into your religious activities?

A. Yes, he has.

Q. Okay.

A. Various ones who have acted disinterested in the past became more interested, and I think one of the specific reasons is because of Miguel's influence. He was in isolation, so he didn't have that much activity with them except at recreation and then at the services that I offered on Fridays.

Q. Do you feel that you know him well enough to know whether or not this is a part, a fake activity on his part calculated only to get someone like you to bring into Court to testify?

A. Yes, I do. Miguel and I shared very private times from, I feel. I've known of his past. He's opened up

more in the past six or seven months to me than he has in the past. I believe that it would be very difficult to fake a Christianity such as what I have experienced with Miguel. I know a for a fact that that is done.

I feel like I'm a pretty good judge of character for that because I have several inmates who have been paroled or probated who live in my home with me and with other members members of my congregation. I have seen behind the bars, so to speak, and people were for it, but I feel like what Miguel has experienced and what he exhibits in his life is sincere.

MR. CAZIER: Mark these

WHEREUPON, at this time, Defendant's Exhibits EE,FF,GG were marked for identification purposes.

ON BEHALF OF THE DEFENDANT

BY MR. CAZIER:

Q. Are you familiar with Miguel's art work?

A. Yes. I am.

Q. I hand what you the Court Reporter marked GG, FF and EE and ask you if you can recognize these exhibits?

A. Yes, I can.

Q. And what is that?

A. Those are pictures. Three among several that I know of that Miguel has drawn himself.

MR. CAZIER: We'll offer defense exhibits EE, FF and GG, Your Honor.

MR. BURRIS: I have no objection.

THE COURT: Defendant's Exhibit EE, FF and GG will be received into evidence.

WHEREUPON at this time, Defendant's Exhibits EE,FF & GG were admitted into evidence.

MR. CAZIER: Pass the witness.

THE COURT: Any cross-examination?

MR. BURRIS: Yes, Your Honor.

CROSS EXAMINATION

ON BEHALF OF THE STATE

BY MR. BURRIS:

Q. Mr. Bernard, when was it you said that you first encountered this person right here?

A. Toward the end of May.

Q. And you have noted marked changes in his the objections and motions filed, all of those things that Mr. Ebbert did not receive the benefit of.

Mr. Powers did not receive the Death Penalty. Forgive me just one more time, and the Defendant brings forward in his defense the Bible. And I have no criticism of those people that testified for the Defendant, but they were here for one purpose. They were here for Miguel Richardson.

You have a broader scope ahead of you. You are not here for Miguel Richardson. You are here for your entire community.

Miguel Richardson is a user. He has used people in the past. He will use them in the future to his own personal well being. He is a manipulator.

Let's think about the times that Miguel Richardson has discovered God for his benefit. All right. Miguel Richardson gets sentenced to a special sentence under the Federal Youth Corrections Act which gives special provision for their rehabilitation for Federal check theft. They can get an early parole, if they are of good conduct. Did Miguel Richardson get early parole? No, but during that course of time Miguel exception when it relates to the breach of the duty. And it really, the Supreme Court has said, is only relevant to this narrow issue of if you are going to say that counsel was deficient for failing to investigate something, then you have got to find out whether he had with respect to that investigation any basis from his client to investigate.

However, what we're saying is quite the opposite. He was justified in not eliciting evidence that would have been used by Dr. Death to send our client to death, to get the client the death penalty.

MR. SHAUGHNESSY: Your Honor, could I point out page 110 of the Writ of Habeas Corpus where it states: Mr. Richardson was denied effective assistance of counsel during both phases of his trial. That, to me, is a claim that Mr. Cazier was ineffective both regarding the guilt-innocence question and the punishment phase.

I might also point out on page 111 it says: Foremost among the deficiencies was counsel's failure to properly investigate and secure the testimony of certain witnesses.

Now, it's the State's position that the decision whether to investigate those witnesses and to secure and present their testimony cannot be

DEFENSE EVIDENCE ON PUNISHMENT

MR. CAZIER: I'll call Doctor Lee Griswold.

THE COURT: Would you be sworn please, sir.

WHEREUPON,

LEE GRISWOLD, M.D.

the witness, after having been first cautioned and duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

* * * * *

DIRECT EXAMINATION

ON BEHALF OF THE DEFENDANT

BY MR. CAZIER:

Q. What is your name, sir?

A. Excuse me. Lee Griswold. G-R-I-S-W-O-L-D.

Q. What is your business or profession?

A. I'm an optometrist, have been all my life.

Q. Are you continuing in the active practice of optometry at the present time?

A. Yes. I go to my office half a day every week.

Q. So, you are semi retired, are you?

A. Yeah.

Q. Are you a lay minister of some religion or faith, Doctor Griswold?

A. Yes. I'm a lay minister. I'm a lay minister in the Episcopal church, but no one understands that, so I say I'm a lay minister.

Q. Very well. Where are you from?

A. From Denver, Colorado.

Q. Do you know Miguel A. Richardson?

A. Yes. I was looking for him. I couldn't see him until you pointed him out, although I know him very well.

Q. How long have you known him?

A. Well, it's been almost two years.

Q. How did you come to know Miguel Richardson?

A. Because I have been visiting at the Denver County Jail every week except this week and one other week for about four and a half years.

Q. All right.

A. And the reason I met him was that someone suggested or asked him if he would like to be called down to visit with a fellow. He hasn't known me. I hadn't seen him before either, but that is the way I have been doing this visitation work as I call it, because I was called out there, it

was suggested that I go there four and a half years ago after my wife met this woman in the grocery store who looked so bad that my wife asked her what was wrong, and she said her son was in the Denver County Jail and no one would go see him. And she couldn't go.

She asked my wife if she could pray for him. She said, "Yes, and maybe we can do more than that". When she came home she said, "Have you ever been in jail?" I said, "No". She said, "I think you should go out and see this boy", and I did.

Q. And you have been visiting ever since?

A. I have been there every week since.

Q. Miguel was in the Denver County Jail for about twenty-three months, wasn't he?

A. I don't know for sure. I've heard that it was twenty-three months.

Q. How long did you actually know him?

A. Well, I've known him now for over a year and a half or around a year and half, and he has been here five or six of those months in San Antonio.

Q. Well, did you know him for a year and a half in Denver?

A. Yeah.

Q. A year and a half in Denver?

A. Yes.

Q. How often would you see him?

A. I would see him every week if it was possible, and there were certain times when the officials didn't let me see him.

Q. They wouldn't let you see him on some occasions?

A. Well, for some reason or another they said he wouldn't be able to see me.

Q. Okay. Where was he when you first met him, what unit was he in?

A. It could be, and I don' remember all of these details like I should. It could have been that he was in building six, but it was shortly after that in the segregation unit which is commonly called the hole.

Q. All right.

A. And that is where I where I spoke to him most of the time, because he was there most of the time that I visited with him.

Q. What was the subject matter of your conversations with Mr. Richardson?

A. Well, you see, as a lay minister I have been warned by all of the administration officials, "Now, you are here for only one thing and you don't try to do anything about their legal status and you don't bring anything in here and you don't take anything out of here and all the rules that go with visitation".

And of course in my work it's to do spiritual counseling you might call it because I was given a social agency pass to go in to use the counseling rooms.

Q. And did you use the counseling room for purposes of religious discussions?

A. Yes, sir. Religious discussions, and there is one thing I would like to say right now, if it's permissible.

Q. Well, what is that, sir?

A. One of the times that I was talking to Miguel, and we called him a different name there, and it's hard for me to say Miguel.

Q. You used to call him Silky?

A. We used to call him Silky.

Q. Everybody called him that?

A. All right. When I met his parents there, when they came to visit him one time, and it was just before that that I had been talking with him in the counseling room, and we were discussing things because the man that was in the hole with him had brought him to a point where he could understand some of the things that any spiritual counselor would say, and I said, "Well, Silky, you understand that there is eternal life for all of us through our Lord Jesus Christ and it's either you end up there or down there. You are either saved or you are lost".

And I was visiting with another young man. They don't call them boys in these institutions, and I was brought to ask about that, so I'm visiting with the men or the fellows out there. And he said he waited until this other

fellow -- I was through visiting with him, and he came back in and he says, "I don't want to be lost. I want to be saved".

We started talking again and from then on our conversation took on a deeper meaning for both of us, and I really feel that I've gained probably as much as Silky has and more maybe.

Q. In the course of your visits there for over a year and a half period, have you observed a change in Miguel Richardson?

A. Oh, yes. It's been marked. The administration even knows the difference, and it happened because Silky started to pass on what he had learned when the first man was taken to California.

And this first man is back already, and I would say well on the way to being a substantial citizen, and so Silky started talking with another man in the segregation unit, and he brought him along, and so I was talking to both of them.

Q. All right.

A. His name was Brittle, commonly called Cosmo, and both of these fellows showed a marked difference in their reactions, and the administration couldn't believe it.

Q. Let me ask you this, Doctor Griswold. Since Miguel left Denver and has come down here to San Antonio, have you continued to correspond with him?

A. Oh, yes. We have corresponded and some of the letters that he has written to me have continued to reveal the changes that have taken place in his life. This is just one thing that I would like to say. When I started visiting there it

was only the third or fourth time and understand I only visited with the ones who were you might say referred to me by the fellow on the tear. They would say would you talk to the fellow in the next cell to me, next house. They use the expression house.

And they say, "Well, he's only fifteen" and I can't read or write but he would like to talk to you. Well, certainly I would like to talk to him. We gave them a bible and I wanted to bring one of those Good News Bibles here when I was called and I didn't know I was going to be called this early.

This is a version that puts the gospel story in a very simple way so that the men can understand it better than they ever have before, and this young fellow couldn't read.

Q. I want you to talk about Miguel Richardson.

A. There was one who could read, and he came through the message of the word of God, which is what we call the scriptures. He came to a very deep understanding of what the christian life is about.

Q. Was Miguel --

A. He began to practice that in the hole.

Q. Was he reading to this younger prisoner?

A. Yes. They read together. They studied together. Cosmo told me, and he was still there after Silky had been brought back to Texas, and he told me about the things that had happened during the time they were in the hole together.

Q. Okay. I don't want you to repeat anything that Cosmo may have told you. Have you had occasion to send one of these bibles to Miguel since he has come down here to San Antonio?

A. Yes, because he wrote to me and said they wouldn't let him bring the bible with him, and could I send him another one. Well, through our group we were able to do that, and very happy to do that, and as far as I know he still uses that same bible.

Q. Thank you, doctor, very much.

MR. CAZIER: We Pass the witness.

* * * * *

CROSS EXAMINATION

THE COURT: Cross-examination.

MR. BURRIS: Yes.

CROSS EXAMINATION

And we had a good time. It was nice.

Q. What type of personality does Miguel have?

A. Very pleasant and just real jolly. You know, he wants to know what is going on around him.

Q. Have you ever observed him to be a violent individual?

A. Not at all. No.

Q. Have you ever observed him to be mean or vicious towards other people?

A. Never.

Q. Have you observed on the contrary that he exhibits warmth and feeling towards other people that he meets?

A. He sure does, because there is a little girl that I know that he has done just that and he hasn't ever face to face met her but he has done so much for her.

Q. Tell the folks on the jury about that little girl.

A. Her name is Karen Cracken. She's fourteen years old, and she's got a lot of health problems as well as family problems. She's an adopted child into a family that the mother is basically an alcoholic, and through me she met Miguel through letters. They have corresponded ever since he has talked to her on the phone when he was allowed phone calls from the county jail in Denver. He has talked to her.

They analyzed her as kind of a suicidal child at that time until he had talked to her and it just completely changed her personality. She's a different person now. He has given her a different aspect of life, somehow, you know, with the things he has written. He has written her poetry. They draw pictures, they send pictures of themselves back and forth, and it's such a change in her that it's unbelievable because she's still staying with me, you know.

Q. How old was Karen when she first became acquainted with Miguel?

A. Thirteen.

Q. They have never met face to face?

A. Never.

Q. They exchanged letters regularly and talked to each other on the telephone?

A. For hours at a time, sometimes for however long he was allowed to talk.

Q. After he came down here to San Antonio have they continued to correspond?

A. Yes. She's written him letters.

Q. As a matter of fact has he called her?

A. Yes, he did. The first phone call I believe that he was allowed to have he called her and talked to her totally and it was real good for her.

Q. What is the nature of that little girl's health problems?

A. She has something wrong with her bones. She has rheumatic fever and some kind of disease in her bones. You know that they are kind of distorted and her feet and things, and it's real hard for a kid at her age to deal with her peers. You know, the tease, the harassment. He's gotten her over that whole thing, you know, just by the way he is, you know.

Q. You mentioned something about his art work. Do you have any background in art?

A. Yes, I do. My mother is a professional artist. She goes to the Academy of Arts, and she has taught me

everything that I know and bragging on me, I'm very good at it. And I've done it for a long time. He is terrific, a great artist.

Q. Has he ever had any professional training in art?

THE COURT: Call your next witness.

MR. CAZIER: Herbert Holston.

THE COURT: Would you be sworn

WHEREUPON,

HERBERT HOLSTON

the witness, after having been first cautioned and duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

* * * * *

THE COURT: Be seated.

DIRECT EXAMINATION

ON BEHALF OF THE DEFENDANT

BY MR. CAZIER:

Q. What is your name, sir?

A. Herbert Holston.

Q. What is your business or profession, Mr. Holston?

A. Minister and primarily administrator and part-time teaching, on and off.

Q. Tell the folks on the jury your educational background, if you would.

A. My former educational background includes Bachelor's Degree in sociology with a minor in education and also a Masters Degree.

Q. Where did you obtain your education?

A. My Bachelor's Degree was Moore House in Atlanta, Georgia. The Master's Degree was obtained from Fisk in Nashville, Tennessee.

Q. All right. Are you an ordained minister?

A. I'm a licensed minister.

Q. Which church?

A. Mount Zion First Baptist Church.

Q. All right. In connection with your ministry have you come to know Miguel Richardson?

A. Yes.

Q. Did you meet him here at the jail in San Antonio?

A. Yes, sir.

Q. How did you come to meet him?

A. As I recall one of ministers who was involved in the prison ministry indicated to me that there was a young

man that had requested counseling from a minister, and he gave me the name and I came up one day. I don't remember the exact circumstance, but I came over one day as a result of that to speak with him.

Q. Was that about the start of the summer of this year; do you recall when did you first meet Miguel?

A. As I recall it was in July of this year.

Q. Okay. And since that time have you seen him on a regular basis?

A. I've seen him at least four times, maybe four or five times.

Q. Okay. And what are the nature of your visits with Mr. Richardson?

A. To be of whatever assistance I can to him or any other person in jail for that matter, in relationship to this spiritual being, his physical being, his psychological being.

Q. Okay. Are the nature of your visits and discussions primarily religious?

A. Yes, sir.

Q. Do you study the Bible together?

A. Yes, sir.

Q. Is Miguel knowledgeable on the bible?

A. I would say that he has a good grasp for many of the major concepts of the bible.

Q. Is he familiar with many of the passages of the bible?

A. Yes, sir.

Q. And able to go to them and read them at will and easily and locate things that he wants to read in the bible quickly?

A. Yes, sir.

Q. Did you have occasion to make a gift of a bible to Miguel?

A. Yes, sir.

Q. Okay. And did you have his name inscribed on the front of the bible?

A. Yes, sir.

Q. And did you further have inscribed on the front of the bible the inscription, "Reverend Miguel A. Richardson"?

A. Yes, sir.

Q. What was your reason for doing tat, Reverend Holston?

A. I did that primarily for my belief that Miguel Richardson has made attempts to bring other persons to Christ. I did not inquire of anyone regarding any formal kind of ordained or licensing, but that is the reason I did it.

Q. Of course the other people are fellow inmates here in the jail?

A. Yes, sir.

Q. That he has influenced in a regular way?

A. I believe that to be true.

Q. Now, have you ever had occasion to discuss with him the nature of the charges against him here in this Court?

A. Well, there was always an opportunity for that. Yes, sir.

Q. Did you ever discuss it?

A. Not in detail. No.

Q. Okay. In fact, I think you told me that you first came to know what he was charged with by reading about it in the newspaper?

A. By a spot announcement on the car.

Q. Okay.

A. Car radio.

MR. CAZIER: Pass the witness, Your Honor.

* * * * *

CROSS EXAMINATION

ON BEHALF OF THE STATE

BY MR. BURIS:

Q. Reverend, of course your education towards the ministry, did you major in psychology?

A. No. Not as a major, no.

Q. Was that a minor?

(WHEREUPON, at this time, the Witness was excused.)

* * * * * *

THE COURT: Call your next witness.

MR. LANE: Your Honor, Petitioner calls Allen Cazier.

* * * * * *

WHEREUPON,

ALLEN CAZIER,

The witness, after having first been cautioned and duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

* * * * * *

DIRECT EXAMINATION

ON BEHALF OF THE PETITIONER

BY MR. LANE:

* * * * * *

Q. Would you please state your name and address for the record?

A. My name is Allen Cazier. My address is 415 Country Wood, San Antonio.

Q. Sir, you are an attorney admitted to the practice of law?

A. Yes, sir.

Q. And when were you admitted?

A. September, 1972.

Q. And where did you attend law school?

A. St. Mary's University.

Q. Do you have a principal area of practice?

A. Criminal law.

Q. Are you Board Certified in any area?

A. In criminal law. Yes, sir.

Q. Could you just describe briefly your employment background from 1927 forward to 1981, approximately?

A. I graduated --

Q. Over the representation of the Defendant.

A. I graduated from law school in May or June of '72, and I served as the Court coordinator for the 144th District Court here in Bexar County for one year. And I went into private practice exactly 24 years ago today. I have been in private practice since that time.

Q. And you said you were the Court coordinator for a Court. Which Court was it?

A. That was the 144th District Court. The Judge's name was Archie Brown. It was a Court that handled only felony criminal cases.

Q. How did you come to serve as counsel for Miguel Richardson?

A. I was appointed by Judge Preston Dial in May of 1981.

Q. Was Mr. Richardson already represented by counsel at the time?

A. He was. He was represented by Clarence Williams, who had been appointed earlier.

Q. Did you both serve as counsel throughout the trial of the case?

A. We did.

Q. Had you previously served as counsel in a case in which the State was seeking the death penalty?

A. Yes, sir.

Q. On how many occasions had you participated in such a case?

A. I had represented two other persons charged with capital murder. One was settled through a plea bargain; one was tried to a jury.

Q. Had you been involved in one at the appellate level, too?

A. Not at that time. It came after 1981. As I recall. I may be wrong about that.

Q. When you were appointed as counsel, when did you first learn of the circumstances of Mr. Richardson's alleged crime?

A. When did I first learn of the circumstances?

Q. When did you first learn of the circumstances of that alleged crime?

A. I think I probably first learned of the circumstances from Mr. Williams, who had been in the case for a couple of months before I was appointed.

Q. Had the crime been reported in the press when it occurred?

A. Yes.

Q. Was it, in fact, a notorious crime?

A. It was well publicized.

Q. And were the circumstances in that case such that if the Defendant was convicted, he would have faced a serious threat of the death sentence?

A. I considered it to be such. Yes, sir.

Q. What did you know of Judge Dial when you learned that the case would be in his Court?

A. Well, I had known Judge Dial since 1972. He was a District Judge at the time I was employed here at the courthouse. And I had handled a number of cases in his

Court. I didn't have a personal relationship with Judge Dial outside the courthouse, but I had tried cases in his Court and I knew the man. Still do.

Q. I'm sorry?

A. I said I still do.

Q. Okay. After you were appointed, did you come to learn the circumstances of Miguel Richardson's background?

A. Yes.

Q. And you also learned of the evidence that the State was going to present against him; is that right?

A. Well, not completely, because at that time there was no open-file policy, and discovery at that time was not anything like it is today. But I knew something about what the case, the State's case consisted of. I had the witness list, and I had spoken to the prosecutors about the case.

Q. Did you come to meet members of Mr. Richardson's family?

A. Yes.

Q. And do you recall which members you met?

A. Specifically, I remember meeting his mother and his father, his sister, Paquita Richardson, and I remember meeting Julio Richardson.

Q. Now, when you met with the Richardson's, did you first meet with them all together? In other words, did you have separate interviews with Paquita?

A. I would say that the only one I had a separate interview with was Paquita Richardson.

Q. Okay. Do you recall speaking with Julio Richardson?

A. I recall meeting him in the presence of his parents. I really don't recall speaking with him beyond being introduced to him.

Q. Did your interviews with these members of Mr. Richardson's family reveal the presence of learning disabilities in Mr. Richardson's past?

A. No.

Q. Did they reveal to you that he had a history of abuse, physical abuse as a child?

A. No.

Q. Did they reveal that he had a possible history of sexual abuse by his sister, Loleta?

A. No.

Q. Did you actively pursue evidence of child abuse, per se?

A. No.

Q. Did you ever subsequently file a motion with the Court to retain a mental health expert?

A. I don't recall ever having filed such a motion. In fact, I had instructed Mr. Richardson to not talk to any psychologist or mental health person unless I was present. So

I don't believe I filed such a motion. It's possible that Mr. Williams did before I was appointed.

Q. Now, in fact, when you were retained, did you discover that Mr. Richardson had been examined by a psychologist prior to your appointment as counsel?

A. I don't remember if it was before I was appointed. I recall that Dr. Betty Lou Schroeder, who was a psychologist employed by the County, did at some point interview him and had prepared a report.

Q. And what was your response when you learned that she had been examining him?

A. My response was to again instruct Mr. Richardson to not talk with her unless I was present.

Q. Do you recall that the trial of Miguel Richardson was conducted prior to the Supreme Court's decision in Penry versus Lynaugh?

A. It was.

Q. At the conclusion of the guilt phase, if Mr. Richardson was found guilty, you were familiar with the issues that would be submitted to the jury?

A. Yes, I was.

Q. At that time, I just want to read the two issues to you and ask if these were the issues that you understood would be submitted to the jury.

Issue number one: Was the conduct of the Defendant that caused the death committed deliberately and

with a reasonable expectation that the death of the victim would result? And is that accurate?

A. Yes.

Q. Okay. And that the second issue was:

Is there a reasonable probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society?

A Yes. That was the second issue.

Q. At the penalty phase, you asked the Court to give a number of instructions as well to the jury; is that right?

A. Yes, sir.

Q. Do you recall requesting an instruction which read, and I'm going to read this requested instruction:

You are instructed that you may answer any of the special issues no if you find any aspect of the Defendant's character or record or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty. Do you recall making that request?

A. Yes, sir.

Q. Did you also request it in several other forms as well?

A. I think there were at least five separate requests along those lines. In other words, requesting instructions having to do with the application of any evidence that the jury might think mitigated against death.

Q. What was your purpose in requesting that instruction?

A. Well, my purpose was to, frankly, to protect the record. We were required to submit requested instructions in writing and to obtain a ruling from the Court prior to the time the charge was read to the jury.

Q. You say to protect the record. Was there any case precedent that established a right to such instruction at that time?

A. No. In fact, precedent was to the contrary.

Q. And you indicated that you were familiar with Judge Dial in his courtroom. Had Judge Dial, to your knowledge, ever given such an instruction?

A. To my knowledge, he had not.

Q. Okay. And to your knowledge, had courts consistently denied an instruction of the type that you had requested to defendants?

A. With one exception that I personally knew of, those instructions had been denied.

Q. Did you believe it was unlikely that Judge Dial would grant your request, Penry type request?

A. Yes. I thought it was unlikely that he would grant those instructions.

Q. And did the case law support your view that obtaining such an instruction was unlikely?

A. I remember that there was one case that was probably in point, and I want to say it was Quinones, that had said additional instructions in addition to the questions would not result in reversible error.

Q. And that was a Court of Criminal Appeals case decided one year before the trial?

A. As I recall it was.

Q. Did you also, were you also familiar with a case of Jurek versus Texas?

A. Yes.

Q. And did that case also indicate to you that there was little likelihood or that there was little support for you getting that instruction?

A. Actually, Jurek is what myself and some of the other members of the defense bar thought supported those instructions. In other words, as we read Jurek, we thought that Jurek supported the giving of some additional instructions to the jury on how the jury might apply mitigating evidence.

Q. And that was decided in 176; is that right?

A. I think so.

Q. And Quinones, one year before your trial, had considered Jurek and decided that it did not require such instruction; is that right? Is that your recollection?

A. I believe that's correct. Yes.

Q. Let me ask you about the practice in those days here in Bexar County and elsewhere. Prior to the Supreme Court's decision in Penry, did the State typically employ expert witnesses at trial during the penalty phase?

A. Yes.

Q. In fact, did the State designate any psychiatrists as experts in Miguel Richardson's case?

A. They did.

Q. Do you recall who it was?

A. Doctor James Grigson from Dallas.

Q. Was Dr. Grigson known among the defense bar?

A. He was very well known to the defense bar in Texas at that time. He testified in many capital murder cases, invariably for the prosecution. He was a particularly effective witness for the State.

Q. Did the defense bar, members of the defense bar refer to him by any other names?

A. He was known as Dr. Death, as I recall.

Q. What did you know of Dr. Grigson's typical testimony in cases in which the State sought the death penalty?

A. Dr. Grigson invariably, whether based upon an examination of the Defendant in question or based upon hypothetical questions, would invariably testify that he diagnosed the individual as having what is known as

antisocial personality conduct disorder. He would go on to testify that that was an incurable condition. And, in other words, testimony in support of the future dangerousness question that was being submitted to the jury.

Q. What did you know the manner in which Dr. Grigson used evidence of child abuse as testimony?

A. As I recall, I had seen Dr. Grigson testify on two occasions. I knew something about his manner of treating cross examination. And it was my belief that he would testify that child abuse was a predisposing factor, or one of the diagnostic criteria for antisocial personality conduct disorder. He called it sociopath or psychopath. He didn't actually use that term, but he would admit that that was the diagnosis under the name.

Q. Was there general awareness among the criminal defense bar at the time that Dr. Grigson took this approach?

A. Yes.

Q. Was it discussed at bar gatherings, legal education seminars and so forth?

A. Yes. And it was covered particularly at the University of Texas Law School where they had a professor there that had paid particular attention to Dr. Grigson and his line of testimony.

Q. Which professor was that?

A. I think his name was Dix. D-I-X.

Q. Based on your belief which you just expressed that you wouldn't receive the proposes instruction that you

wanted and anticipating what the State's expert was likely to say, how did you think the jury would consider evidence of child abuse or physical abuse of the Defendant as a child?

A. I was afraid that that type of evidence would only support Dr. Grigson's diagnosis. And for that reason, we didn't pursue that area. And it was my belief that it would be better to present evidence that would be contrary to the diagnostic criteria, which as I recall, spoke a lot of - there was a requirement under the diagnostic criteria that the diagnosis had to be made based upon conduct that had occurred prior to age 15. And so the evidence that we sought to develop that related to Mr. Richardson's conduct prior to age 15, we hoped to develop evidence that was contrary to the diagnostic criteria.

Q. Okay. What would be the kind of evidence that you sought to develop in that regard?

A. Two-parent family, discipline in the home, religious training, participation in education, extracurricular activities at school, that sort of thing.

Q. Do you recall who presented that evidence during the penalty phase?

A. Do I recall who the witnesses were?

Q. Yes. Who were the witnesses? Well, let me ask you, it's been 16 years. Do you recall that Paquita Richardson provided such evidence?

A. I recall that she provided that type of evidence, and I believe she was the only family member to testify.

Q. Did, in fact, let me ask you something. Did your response to your learning of Betty Lou Schroeder's

examination, was that driven also by what you anticipated Dr. Grigson would do with what she found?

A. I'm not sure if I understand your question, but Dr. Betty Lou Schroeder's diagnosis was, as I recall, the same diagnosis that I anticipated that Dr. Grigson might make. Probably on hypothetical, but it would have supported that diagnosis.

Q. In fact, the State did call a psychiatric expert at trial; did it not?

A. A psychologist.

Q. A psychologist. And was that Dr. Robert Rast?

A. Yes.

Q. All right. Did he use in his testimony the evidence, the report that Betty Lou Schroeder had prepared?

MR. SHAUGHNESSY: Your Honor, the record will reflect what the testimony of Dr. Rast would be. I think that's a better record of what it was rather than the memory of Mr. Cazier.

THE COURT: Sustained.

ON BEHALF OF THE PETITIONER

BY MR. LANE:

Q. Is it the case that the only examination of Miguel Richardson by mental health professionals was used by the State to secure the death penalty?

A. Would you ask that question again?

Q. Betty Lou Schroeder was the only individual who examined Mr. Richardson; is that correct?

A. To my knowledge, yes.

Q. Isn't it the case that this being the only examination of Miguel Richardson, that the only examination of him was, in fact, used by the State in order to secure a death penalty against him?

A. To be honest, I don't remember whether or not Dr. Schroeder's report was used in evidence. I honestly don't remember that, or if it was referred to by any witness.

Q. I guess what I'm trying to understand is, is it the case that what you feared would occur, in fact, ultimately did occur with her report, if you developed other evidence in the mental health area?

A. Well, what I recall is that Dr. Rasp did, in response to hypothetical questions, testify that the hypothetical person was a sociopath and incurably so.

Q. Did your knowledge of how the State would typically use evidence of child abuse and mental defect or illness have an impact on the manner in which you prepared for and handled the punishment phase?

A. Yes.

Q. And was - I want to turn to the practical effects. Did you attempt to investigate, prepare or present evidence of mental impairment or child abuse?

A. No.

Q. And that was for the reasons that you testified?

A. Yes.

Q. Did you investigate if there was any available medical and psychiatric evidence concerning Mr. Richardson?

A. No. Not that I recall.

Q. Were you concerned that that might turn up something else that might be used by the State?

A. That was a concern. Yes.

Q. Okay. Mr. Richardson testified yesterday, Julio Richardson, let me make that clear. He testified to a number of things. First of all, you have seen his affidavit that was submitted with the application?

A. Yes, sir.

Q. Were you aware of the circumstances of child abuse that he described in that affidavit at the time of trial?

A. No. I was not.

Q. Was that something that you wanted to - was that evidence that you wanted to develop?

A. No.

Q. Okay. Is it fair to say that you were chilled from developing that evidence because of the possible uses of the evidence?

MR. SHAUGHNESSY: Your Honor, this isn't cross examination. That's a leading question. I object.

THE COURT: Rephrase your question.

MR. LANE: Okay.

ON BEHALF OF THE PETITIONER

BY MR. LANE:

Q What effect did your anticipated failure to get the instruction and the possible uses of the evidence by the State have on you?

A. Well, in anticipation of the probable testimony of Dr. Grigson, I really didn't want to seek out and find any evidence that would corroborate his hypothetical diagnosis. I didn't ask about child abuse. I didn't go into it. I was interested in just the opposite, frankly.

Q. Now, given that approach based on the realities you were facing, were you aware that, as Julio testified, Julio Richardson testified, that Miguel Richardson as a child was beaten with a hose, a razor strap and a two-by-four?

A. I don't believe I had heard any of those things. No.

Q. Were you aware at the time of the trial that Miguel Richardson's father had held a knife to his neck and threatened him in that manner?

A. No.

Q. Were you aware at the time of trial that Miguel Richardson's father had actually stabbed him in the buttocks with a knife?

A. No.

Q. Were you aware at the time of trial that Miguel Richardson's father had tied him to a pole and beat him until near unconsciousness?

A. I didn't know that.

Q. Now, had you known that the Court would grant your Penry type instruction, would you have approached - and is it fair to say, let me ask you first, that the instruction you requested would now be considered a Penry type instruction?

A . I believe it is. Yes.

Q. Shorthand reference to that. Had you known that the Court would grant your request for a Penry type instruction, would you have approached the penalty phase differently?

A. Yes.

Q. And how so?

A. Well, I would have been - I guess we're talking about hindsight now, but I would have been more conscious about developing evidence of child abuse and/or mental retardation.

Q. Have you handled capital cases since the Miguel Richardson case?

A. Yes.

Q. And based on that experience and based on your being a board certified criminal lawyer, is it your

understanding now that with the Penry instruction, developing evidence of child abuse is something that you would do or should do in defending a capital murder case?

A. I think you would have an obligation to do that. Yes, sir.

Q. And has the right to that kind of instruction changed your approach in those cases? In other words, you testified that you speculated, or that you could speculate that you would have changed. But, in fact, post-Penry, has it, in fact, changed your approach?

A. Well, I would have to answer that hypothetically because I have not prepared to try a capital case since Penry, but it would have changed, it would change the way you would investigate and develop punishment phase evidence. Yes.

Q. And based on your experience as a board certified criminal lawyer, are you aware that it has, in fact, changed the approach of other defense lawyers in preparing for the penalty phase?

A. Yes.

Q. Is it now typical to investigate and develop evidence of mental impairment, mental defect, and child abuse for the penalty phase of a capital case?

A. I believe that that's what lawyers are now conscious of. Yes. I would be.

Q. Mr. Cazier, you are aware that Miguel Richardson is asserting a claim for ineffective assistance of counsel as a ground for relief?

A. Yes, sir.

Q. How would you characterize your feelings about the assertion of that?

MR. SHAUGHNESSY: Objection to relevance, Your Honor.

MR. LANE: Well, it goes to his testimony, what he feels about his testimony. How does that - how do you feel about that assertion at this point, of that ineffective assistance claim?

THE WITNESS: I suppose I resent it. I'm not happy about it.

ON BEHALF OF THE PETITIONER

BY MR. LANE:

Q. Have you had an opportunity to review the application for post-conviction writ of habeas corpus?

A. Yes.

Q. Have you specifically had an opportunity to review the section on ineffective assistance of counsel at pages 110 through 120 of the application?

A. Yes.

Q. Do you recall that it contains a number of statements as to what you did or did not do as trial and appellate counsel?

A. Yes.

Q. Was the description accurate of what you did or did not do?

A. I think it's factually accurate. Yes.

Q. Were there any misstatements as to the facts set forth in those pages as to what you did or did not do?

A. No.

Q. Okay. Thank you for coming down here today.

MR. LANE: At this time I'll pass the witness.

MR. SHAUGHNESSY: Your Honor, before we begin on the State's cross examination, I need to take up an issue that arises in this context, and that would be whether or not there is a privilege that exists now between Mr. Richardson, or belonging to Mr. Richardson regarding conversations he had with Mr. Cazier during the course of his representation of Mr. Richardson.

I would point out to the Court that under Rule 503(d)(3) of the Texas Rules of Criminal Evidence, it states there is no privilege under this rule as to a communication relevant to an issue of breach of duty by a lawyer to his client or by the client to the lawyer.

Furthermore, the seminal case from the United States Supreme Court regarding allegations of ineffective assistance of counsel, as I'm sure counsel for the Petitioner is aware, is Strickland versus Washington authored by Justice O'Connor in 1984, in which he states on page 2066 of the Supreme Court Reporter, in short, inquiries into counsel's conversations with the Defendant may be critical to a proper assessment of counsel's investigation decisions just as it may

be critical to a proper assessment of counsel's other litigation decisions.

For this reason, it's the State's position that any conversations between Mr. Cazier and Mr. Richardson, and any conversations between Mr. Williams and Mr. Richardson overheard by Mr. Cazier are not privileged and they are not only relevant, they are critical to a resolution of the question of whether or not Mr. Cazier rendered effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article 9, Section 10 of the Texas Constitution. For that reason, I would like to develop those conversations.

THE COURT: Let's take up that issue after lunch. Be back at 2:00 o'clock. Thank you.

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RECESS

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THE COURT: All right. You may proceed. Mr. Shaughnessy, I think you wanted to clear up something.

MR. SHAUGHNESSY: Well, Your Honor, we were just seeking a ruling regarding the privilege that may or may not exist regarding communications between Mr. Richardson and his attorney, Mr. Cazier, and his then attorney, Mr. Williams.

MR. LANE: Your Honor, as I understand it, Mr. Shaughnessy is suggesting that there is some sort of blanket waiver of all attorney-client, or all privileges associated with any attorney-client communications as a result of the claim of ineffective assistance of counsel. That

simply is not the law. There is no case that requires that. There is no doctrine that requires that. And, in fact, the very language that Mr. Shaughnessy quotes, or the very case that he quotes makes it very clear, and I want to read it because it's very important what the language says:

It says: "Where a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to proper assessment of counsel's other litigation decisions."

Now, what it doesn't say is that there will be no attorney-client privilege as to any communications. It says when you challenge a failure to investigate as unreasonable, conversations relating to that investigation, information that would have led counsel to investigate, would be waived. Just those communications.

Well, as I think we made very clear in our papers and we made very clear during Mr. Cazier's direct testimony, we don't say at all that his failure to pursue this mitigating evidence was -we're not challenging his failure to. There was a very strong justification, and that was the chilling effect of not getting that Penry type instruction that everyone knew he wouldn't get, every other member of the bar knew he wouldn't get, and we're going to find that the D.A.'s office knew he wouldn't get it. And that affected his behavior. And in light of that, that anticipated failure to obtain the instruction, his failure to find, you know, elicit the child abuse evidence, which the 5th Circuit has recognized time and again as such valuable mitigating evidence in a death case, that that failure was not -we're not challenging that failure as

ineffective; therefore, we haven't opened up any privilege on that ground.

There is only one, and I should say also that the Court of Appeals in Texas has made clear that the policy of Texas is to disallow attorneys revelations of client information, to do that only in very limited circumstances that are reasonably necessary to resolve a conflict as a result of this alleged breach of the duty.

Now, in this case, the blanket waiver, which Mr. Shaughnessy seems to be suggesting, is not necessary. It's not reasonably related to what he wants to inquire into. There was only - of all the ineffective claim, there's only one that relates to investigation at all, and that relates to failure to investigate certain exculpatory evidence relating to some women who were staying at the Holiday Inn, and that's set forth in the papers.

So I would just suggest, Your Honor, that if we take it on a question by question basis, when we feel he's inquiring into the privilege, we can assert the privilege and Your Honor can deal with it then, but to say just before the examination we're going to get rid of the attorney-client privilege is overbroad, it's unnecessary, and it's not justified by any case.

THE COURT: All right. Then we'll proceed in that manner. Take one question at a time. Do you have a problem with that?

MR. SHAUGHNESSY: Could I get a clarification, Your Honor? Is every question I ask of Mr. Cazier regarding conversations he had with Mr. Richardson, are we going to have to develop the question of whether that's privileged on a question by question as we go?

THE COURT: I take it that you know what the testimony is going to be and you have a general idea of what the questions are going to be, those posed by Mr. Shaughnessy.

MR. LANE: Well, I have to, frankly, I'll tell you I suspect that he is going to claim that there is no attorney-client privilege and he's going to go on a romp through an otherwise forbidden area; that he knows that should we actually get relief and get a new trial, that then our client, the Petitioner is going to be prejudiced in any retrial because all that attorney-client communication is going to be opened up and be used against him at a subsequent trial. That's why the interest is so important.

But what I'm not asking - I think we all can agree, and I think Mr. Shaughnessy will agree, that any communication between Mr. Richardson and counsel during the course of that relationship for the purpose of the representation, which was the only reason they ever communicated, is privileged. So we know that it's privileged. The question is whether it falls into the exception to the privilege. Not whether it's waived; whether it falls into the exception of the privilege, which applies when there is an alleged breach of the duty of the attorney.

This is not a waiver question. This is an exception to the privilege question. And just because there may be an exception to the privilege for a specific communication, and Your Honor is familiar with those, if you approach counsel in order to try to commit a crime, that's not covered by the privilege. If that's elicited and it gets into the record, that's not a waiver of the privilege. And so waiver of the privilege is sort of a blanket thing.

The ineffective assistance has, there is an exception when it relates to the breach of the duty. And it really, the Supreme Court has said, is only relevant to this narrow issue of if you are going to say that counsel was deficient for failing to investigate something, then you have got to find out whether he had with respect to that investigation any basis from his client to investigate.

However, what we're saying is quite the opposite. He was justified in not eliciting evidence that would have been used by Dr. Death to send our client to death, to get the client the death penalty.

MR. SHAUGHNESSY: Your Honor, could I point out page 110 of the Writ of Habeas Corpus where it states: Mr. Richardson was denied effective assistance of counsel during both phases of his trial. That, to me, is a claim that Mr. Cazier was ineffective both regarding the guilt-innocence question and the punishment phase.

I might also point out on page 111 it says: Foremost among the deficiencies was counsel's failure to properly investigate and secure the testimony of certain witnesses.

Now, it's the State's position that the decision whether to investigate those witnesses and to secure and present their testimony cannot be

Court is prepared.

THE COURT: I'm very much prepared.

MR. ROSENFELD: We'll move on to now another part of the case, which is under Claim 3-C with respect to the pending case on the evidence that could have been presented had a Penry instruction been submitted.

THE COURT: Okay. And you are Maria Keane?

MS. KEANE: Yes, I am.

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WHEREUPON,

JULIO RICHARDSON,

The witness, after having first been cautioned and duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

* * * * * *

THE COURT: Please be seated. You may proceed.

DIRECT EXAMINATION

ON BEHALF OF THE PETITIONER

BY MS. KEANE:

Q. Could you state your name and address for the record, please?

A. My name is Julio Richardson. I live at 4025 Northeast 19th Circle. I got a new address now, it's 513 East Rickenbacker, Midwest City.

Q. That's in Oklahoma?

A. Right. Oklahoma.

Q. How old are you, Mr. Richardson?

A. Forty-one.

Q. And what is your relationship to Miguel Richardson?

A. Well, I'm a younger brother.

Q. How much younger are you than Miguel?

A. One year.

Q. Prior to this week, when was the last time you saw your brother Miguel?

A. As far as I can recollect, I think it was a year ago.

Q. And have you corresponded with your brother? Do you write him letters?

A. No. I don't write him.

Q. Do you speak with him on the phone?

A. No.

Q. Did you grow up in the same household as Miguel?

A. Yes, I did.

Q. Where was that?

A. It was at 4025 Northeast 19th Circle.

Q. Can you describe for us the house that you grew up in?

A. Well, I'm not sure how many acres of land. It might have been seven, ten, I'm not sure. But at the time, it was pink and white. We had a gravel road at the time. We had pigs and chickens. And it was four sisters and three of my brothers. And we had two ponds, little ponds, creeks, or whatever they call them.

Q. Can you describe the neighborhood that you lived in? What was that like?

A. Well, my grandmother lived down the street, and we had maybe, at the time, three other neighbors, three or four other neighbors that I can recall, in the same mile radius. And it was really a peaceful neighborhood, because there wasn't anyone around but us.

Q. You mentioned some brothers and sisters. How many brothers and sisters do you have all together?

A. Eight.

Q. There are eight, plus you is nine?

A. Plus me. I have a step-sister.

Q. So, is that ten all together?

A. It would be ten all together, yes. But we didn't grow up with our older step-sister.

Q. Can you give us the names of your brothers and sisters?

A. Well, okay. My step-sister's name is Pearly Mae.

Q. Pearly Mae. Is she the oldest?

A. Yes. But we don't really know her that well. She was before us, before, you know, we came. And I have Loleta -- well, Petillio is first, then Loleta, Thecia, Carmen, Miguel.

Q. Then you?

A. Me, Paquita, and Cortez - Guadilupe and Cortez.

Q. Until what age did you live with Miguel?

A. From when I was born to, I think 16 or 17 years old.

Q. Okay. So that was about 16 years you lived with him?

A. Right.

Q. And during that time, did you spend a lot of time with Miguel as you were growing up?

A. Yes. We were always together. Every day.

Q. Can you tell us about your father? What did he do for a living?

A. Well, he used to work for GX. I think he worked on airplanes then. And then he went to Tinker Field Air Force Base, and he retired from Tinker Field Air Force Base, I think as a journeyman.

Q. And he was at Tinker Field when you were growing up?

A. Right.

Q. Did Miguel and your father get along when Miguel was a child?

MR. SHAUGHNESSY: Objection, speculation, Your Honor.

THE COURT: If he knows, he may answer the question.

THE WITNESS: I don't know what you mean, how did he get along.

ON BEHALF OF THE PETITIONER

BY MS. KEANE:

Q. What was their relationship?

MR. SHAUGHNESSY: Objection, speculation, Your Honor.

MS. KEANE: I'm just asking if he knows.

THE COURT: It's overruled.

THE WITNESS: Well, can I answer that?

MS. KEANE: Yes.

THE WITNESS: Well, I think my father really liked Miguel the most out of, you know, his sons. And I think he wanted Miguel to be just like him. He looked a lot like my father. But he still got whippings like everybody else.

ON BEHALF OF THE PETITIONER

BY MS. KEANE:

Q. Miguel got whippings?

A. Yes.

Q. Okay. Did you witness these whippings?

A. Yes, I did.

Q. How often was Miguel whipped by your father?

A. Sometimes mostly at least twice a week or more.

Q. When you say whipped, can you describe for us a little bit more of what that entailed?

A. Well, what with or how hard?

Q. Start with what.

A. Well, we had belts. Like we had names for them, like the green hornet was a rubber hose or a garden hose. And the Whippoorwill was a hose, I think was used for pumping oil or gas that he got from work, you know. And he had a razor strap, and sometimes if he didn't have anything to whip us with, he would just, when we were cutting wood, he would just cut a switch off a tree.

Q. Was Miguel whipped with each of those things that you just described?

A. Yes.

Q. What did the rubber hoses look like? I know you started to talk about the green garden hose. What about the other hose?

A. Okay. The other hose was - it was like a clear hose, and it was about maybe three inches, three inches around, maybe about that big around. I'm not sure how big around, but - and the reason why we called it the Whippoorwill is because it whistles, you know, like a hose will make that noise, and there is a toy they make like that now.

And the switch would be about any size, really. Sometimes he would, you know, hit you with a two-by-four or anything; his hand, or the back of a knife or just anything.

Q. Did that happen to Miguel as well?

A. Yes.

Q. And how long would each of the whippings by your father to Miguel last?

A. Well, Miguel's whippings would last longer because he would try not to cry. He would say, "I'm going to be a man; I'm not going to cry." And my father would whip him longer than the rest of us.

Q. Do you remember how long, in terms of minutes, that would be?

A. Well, I was real young. I remember that he would whip us and whip him until he would cry. He would whip you until you just felt like you were just going to pass out, or it seemed like he knew right when to quit. You would just pray to God that this would stop. It just seemed like he would just quit right then. So, like I said, it would last up to maybe a minute, a minute and a half, two minutes, maybe sometimes.

Q. And was Miguel injured as a result of those whippings?

A. Well, he sat on pillows a lot from that. And I seen before where he had whelps on his behind and I think he still has three of them still there today from injuries. And there is a lot more injuries, like knife wounds. My father stabbed him one time in the behind with probably a six-inch knife, maybe a half or maybe a fourth of it. And, but there is a lot of times, but I can't remember all of them, because we never went to a doctor for it or anything. He would just do it hisself, take care of it.

Q. Do you remember any specific details of the whippings that Miguel suffered by your father?

A. Yeah. The ones that I remember the most is when my father tied him to a clothesline pole. Miguel had run away from getting a whipping. He didn't want the whippings sometimes, so he would run, and my father would tie him to a pole and whip him. And at that time, my father whipped him until he almost passed out, or passed out, because I remember he got real still. And my father took him down and put ice to his head and cold water to his head.

Q. How old was Miguel at that time?

A The height of how he was on the pole, was probably about eight or nine years old.

Q. What did your father tie Miguel to the clothes pole with, the clothesline with?

A. I don't remember what he tied him with, what it was. I know we had ropes and belts and everything, so --

Q. Do you remember what he whipped him with when he was tied to the clothesline?

A. I think he whipped him with his belt that time. He had it on his waist.

Q. Do you remember any other specific instances of whippings that Miguel received at your father's hands?

A. Well, I remember one time Miguel wanted to wear an afro, because everybody was wearing an afro, and he was wanting to wear one. And my dad was making him cut his hair. And he said he didn't want no haircut. My daddy took a two-by-four to him a couple of times, and he went and got, went on and got a haircut.

Q. And a two-by-four is a piece of wood?

A. Not a two -- I mean a stove wood.

Q. What is a stove wood?

A. That's a piece of wood that he would tell us to cut 12 inches long so that it would fit in our stove. I remember that because we had to cut them that length.

Q. So it was 12-inches long. And how thick was it?

A. Probably about as big as - maybe bigger than my arm. About maybe four or five six inches. I'm not sure.

Q. And how old was Miguel at that time?

A. I'm not sure. I think that was around '70, maybe '70, '71. I'm not sure.

Q. Was it before or after Miguel left home?

A. It was before he left home.

Q. How old was Miguel when he left home?

A. I think he was 16. I'm not sure.

Q. Do you remember what happened that made Miguel want to leave home?

A. Well, you know, my dad used to do things like to scare us. Sometimes he would like shoot his gun off or something to make us listen, or we would we were

laughing and he would say: My kids don't respect me no more; they won't listen to me. We would be doing something and he was in the house. He would come outside and shoot his gun off real fast, a .22 automatic. It was like a semiautomatic or something. But it didn't bother us because we figured out he was just playing with us, he was just trying to scare us. We didn't pay no attention to that. But then one day Miguel - my dad don't like us to sleep without shirts on or underwear on or something. We couldn't sleep without, you know, something on. And one day Miguel was sleeping in the nude, you know. We had bunk beds. And my dad, I told my dad, I said, "Dad, Miguel is sleeping with no clothes on." So my dad went in there and started whipping on him. And Miguel was trying to, you know, he was getting a whipping, you know. It was hurting him, so he was kicking, you know. Laying on the bed just kicking, you know, while he whipping him. And I think he -- I'm not sure, but I think he cracked one of my father's ribs, you know, by doing that. My dad went and got a gun, a pistol. I think it was a .38. I don't know. It was a big round gun, like it was a revolver. He told him he was going take this whipping, or you're going to take this gun. And somewhere after that, I remember that Miguel just got stabbed. Well, at first what he did, he said, "You are going to act like a nigger on the street," he said, "I'm going to treat you like one." At that time, he pushed Miguel on the shoulder and put a knife on his neck like that. And he said, "Don't move, nigger." And then - and then - (pause) Miguel was sitting on the dresser with blood on the dresser.

Q. That was Miguel's blood on the dresser?

A. Yes.

Q. Do you want to take a minute?

THE COURT: There's some tissues right there if you want them.

ON BEHALF OF THE PETITIONER

BY MS. KEANE:

Q. Mr. Richardson, I know this is difficult, but just bear with me. Are you saying that your father stabbed Miguel with the knife at that time?

A. Yes. He stabbed him.

Q. What kind of knife was it?

A. It was a pocket knife that was, I think he made it because he used to make stuff like that. It had, I think a buck handle on it. It was white and brown, and a dear horn or something it was made out of.

Q. And what happened after that day?

A. And I don't remember anything after that day, that part right there when he stabbed him. I know he didn't take him to the hospital or anything, but he probably just took care of him. That's what he would do, he would doctor it hisself.

Q. Miguel was bleeding at the time?

A. Yes.

Q. And what did Miguel do after that?

A. He just sat there on the dresser and crying.

Q. Did Miguel leave home shortly after that?

A. Yeah. He left home after that.

Q. Was it just your father that hit Miguel or was there anyone else in the household that hit Miguel?

A. Well, Petillio would slap him a lot. Like he was sucking Kool Aid off the table or something, he would slap him on the top of his head and bust his mouth on the table, make his nose bleed several times. He would just pick on him all the time. He was the older brother.

Q. How often would you say that happened?

A. He may do something to him maybe once or twice a month because he never did get in trouble for hitting on him.

Q. And did your brother, Miguel, get hit by your mother?

A. Yes. He got hit. My mother would teach us how to read, teach him how to read, and she would take this sawed-off broom stick, you know, about how they made it, an inch around, and hit him with a broom stick. And like if he would miss a word, she would hit him on the back of the neck or something, or on the shoulder. If he didn't do it fast enough, she would hit him, you know. And then when he got to where he was scared to say anything, then she would hit him anyway. Hit him because he wouldn't say anything, until he would say something.

Q. How old was Miguel at that time?

A. She did that from when he was probably the first grade on to middle school until he got in high school, and she just quit doing it because she quit trying to teach him because she couldn't teach us.

Q. And how often do you recall your mother hitting Miguel the way you just described?

A. Probably three times a week. Whenever he had homework to do and he couldn't do it.

Q. Did your mother do anything else in terms of talking to your father or communicating with your father in terms of hitting the children?

A. Well, yeah. She used to make a list that things that we did, and she would write on it, you know, our names down and she would make a number of how many things that we did wrong. And if it got to a certain number, we would get a whipping. And she would do it herself sometimes, but if she had to whip you, then my father would say, "You don't make my wife mad," and you would get another whipping from him, too, from upsetting his wife.

Q. Do you remember any other instances of where when you were being baby-sat by your sister?

A. Yes. I know I was around - it was right before we moved on the farm. Miguel was six and I was five. And we were sitting in the doorway of my father's room because we couldn't go inside because he didn't allow us to go in his room. And I Love Lucy show was on. I can tell you everything she was wearing. She had a black dress on, black shoes, and her hair was up in a bun, and it was curly in the front.

MR. SHAUGHNESSY: Can we have a clarification as to who we're talking about?

THE WITNESS: Loleta.

ON BEHALF OF THE PETITIONER

BY MS. KEANE:

Q. Let me clarify this a little bit. What you just described as the person with the hair and dress and so forth, who was that?

A. That was Lucy Ricardo on just a show, the Lucy and Ricky show.

Q. And otherwise, you are relating an incident dealing with your older sister, Loleta?

A. What I'm telling you is everything I can see. Right now I can see it just as clear. I can tell you - I couldn't read the TV, but I know the first letters were L and the last letter on the TV was a big O, just the name on the TV. I remember everything. The sunshine was in the room about a 45-degree angle. It was around about probably 10:00 in the morning. I know it was a black bedspread. It was red roses embroidered on it. And I remember the carpet. And I remember Loleta saying that if - she said - we didn't take a bath but once maybe a day, or if we wasn't dirty, we wouldn't take one at all because we had to save on the water bill because there was so many of us.

So, Loleta said, "If y'all take a bath," she said, "I'll give you some butter cookies and chocolate milk." You know, we liked butter cookies and chocolate milk.

Q. How old was Loleta at this point?

A. She was a teenager. I'm not sure exactly what age she was.

Q. Okay.

A. And so she told Miguel to go first because they knew I didn't like to take baths at that time. So she took Miguel first, and they turned - I heard the sink water on. I said, they are teasing me, they are tricking me. They want me to take a bath. Because I heard the water. I was thinking that. And then so many minutes later, I think they were in there maybe, I don't know, I can't remember how long. It could have been 20 minutes, 10 minutes, it could have been five. I'm not sure how long.

But then Miguel came out and he sit in the hallway up against the dresser, up against the drawers where you put the towels and stuff in the hallway in front where the TV, watching the TV. He just sit there with his head down. And I said, "You didn't take a bath, did you?" I said, "You all are tricking me." And he didn't say nothing.

She told me to come on in there and I went in there. And then she told me to suck her right there, you know. And I did. And I remember - I don't remember, you know, I know it was her. But I don't remember seeing her face, because I guess I didn't want to see her. And then she washed my private off. That's all I remember at that point. So I figured that Miguel, it happened to him the same way.

Q. Okay. I know this is difficult for you, Mr. Richardson, but I have to ask you to be a little bit more specific about where she asked you and where you sucked her.

A. Well, her private. She told me to suck her on her private. And I did. I don't know how I felt. I

don't know how I felt when I did it. I know I didn't see anything, but I know I did it.

Q. Do you have any recollection of whether this type of thing happened again to you and Miguel?

A. Well, I know it didn't happen to me anymore, but I think she continued with Miguel, but not me.

Q. And while you and Miguel were growing up, did anyone else in the family hit or whip Miguel?

A. Well, Loleta used -- Loleta didn't like him. She always hated him. And she used to slap him around, throw stuff at him. One time he put some hair grease all over my face, and she stomped on him about six or seven times until his nose started bleeding. His nose bleed easy.

Q. Where was she stomping on him?

A. She stomped him --

Q. What part of his body was she stomping?

A. She was stomping him in the chest area and the stomach. She was just jumping up and down on him.

Q. How old was she at the time?

A. She was a teenager.

Q. How old was Miguel?

A. Probably about six or seven.

Q. And how often did those types of incidents happen with Loleta and Miguel?

A. Well, she mostly would just scratch him all the time or choke him. You know, like he had been drinking water or something, and she would choke him until water would come out of his mouth, stuff like that.

Q. How often would those sorts of things happen?

A. She would get mad. I think she did stuff to him at least three or four times a week, just all during the day, just doing stuff to him.

Q. Switching to a different time, Mr. Richardson, did there come a time when your parents sent Miguel to Dell City High School?

A. Yes. We lived in an area that was difficult, even today they can't hardly figure it out. We lived in a county district and it's kind of in the city district, and it's like we can go to either school. We can go to county or city school. And Dell City, the schools wasn't bussed then. They didn't bus the schools. But Pleasant Hill was already integrated, it was an integrated school. It probably had maybe six, seven families in Pleasant Hill in the school. And Dell City might have had two, and there was a lot more people in Dell City. And Miguel wanted to go to Douglas, another school besides that school. He said - he would come home complaining about that the white guys would try to jump on him. They wouldn't let him play on the football team. They would chastise him or try to make him do stuff.

Q. Was this at Dell City now?

A. Yeah. Dell City.

Q. About how many black children where there at the school?

A. What I was hearing from my parents, probably maybe just two families. Our family and their family. Just Miguel and another family. I think it was a guy and a girl.

Q. And what did you observe about Miguel coming home from that school?

A. Well, he didn't ever talk to me about what happened in school much. But he talked to my parents. And I remember seeing him one time he came home with his hands broke, and they put a cast on him.

Q. Both hands were broken?

A. I think so, if I can remember. And another time he went to school, and there was a bomb threat made, you know. And --

Q. Who made the bomb threat?

A. Miguel said, they said Miguel did. But Miguel was always, you know, he said he was being like pushed into things, had to do things. One time they got him drunk, and Miguel --

Q. Who is they?

A. He said some guys got him drunk and tried to beat him up. That's when he got his hand broke that day. They got him drunk and tried to beat him up. And my dad, the principal called my dad to come get him from school.

Q. When you say they got him drunk and his hands were broken, who was they?

A. I think it was the guys on the football team.

Q. They were white boys or black boys?

A. They were white guys.

Q. Now, before, at or about the time that your brother, Miguel, was on trial in '81, did any of his lawyers, his trial lawyers contact you?

A. No.

Q. To talk about the things that you just testified about?

A. No.

Q. Where were you living at the time?

A. Well, I was living at Kipnaps on Northeast 23rd.

Q. In Oklahoma City?

A. Yes.

Q. Did you know that your brother was on trial for murder at that time?

A. No.

MS. KEANE: I have no further questions.

CROSS EXAMINATION

ON BEHALF OF THE STATE

BY MR. SHAUGHNESSY:

Q. Mr. Richardson, what do you do for a living?

A. Well, I used to work for Oklahoma City Street Department for 15 years. And then now I'm a costume designer, entertainer.

Q. In Oklahoma?

A. Yes.

Q. Your brother, Miguel, was a costume designer of some sort at one time; is that correct?

A. Well, he used to teach modeling. He used to model hisself.

Q. And we have been referring to him for the last hour or so. Is this your brother in the orange outfit with the wire-rimmed glasses?

A. Yes, it is.

Q. When was the last time you saw him?

A. Right about a year ago, I think. I'm not sure exactly how long. It could have been a year ago.

Q. You say that you were unaware that in 1981 your brother was in San Antonio being tried for the offense of capital murder; is that correct?

A. I didn't understand.

Q. At the time he was being tried, were you aware of the fact that he was being tried for the murder of those two security guards?

A. Not at the time. No.

Q. All right. When did you find out that he had been charged with that crime?

A. Well, my sister called, Paquita Richardson. She lived in Houston Texas.

Q. Paquita?

A. Paquita. She said that she saw it in the paper. That's how we found out. And my parents told us.

Q. Did you know that your brother was arrested in Colorado for this offense?

A. Well, I didn't know that he was arrested in Colorado until after I found out that he was being tried for murder.

Q. So there was some three-year period of time where you had no idea where your brother, Miguel, was or what he was doing; is that true?

A. It couldn't have been three years.

Q. Well, you didn't know he was arrested in Colorado; is that correct?

A. Right.

Q. And you didn't hear about the fact that he was being tried in San Antonio until after the trial; is that right?

A. Right.

Q. And if the record shows that's in excess of two and a half years, then it's fair to say you didn't know where he was for over two and a half years?

A. Well, the last time I saw Miguel before I heard from him - I'm not sure what year it was. I can't remember the date or year. I'm not good at remembering a lot of things like that. I don't know my brothers' and sisters' ages, most of them, but Miguel's and Paquita's age, and that's all. I don't know the rest of them's age or birthday. I'm not sure exactly how old my own kids are, really. And I just don't remember stuff like that.

Q. That's fine. Do you remember an individual by the name of Rhonda Bearden?

A. I'm hard with names. No.

Q. Did you ever have an occasion to meet an individual by the name of Vicky Franklin?

A. Yes. I met Vicky Franklin.

Q. And how did that happen? How did you come to meet Vicky Franklin?

A. Well, I was dating her sister, and I met her through her sister.

Q. Were you living with Victoria, or Vicky Franklin's sister?

A. Yes.

Q. And at that point, was Miguel living with Vicky Franklin?

A. No. He was living with us, her sister.

Q. At some point, Miguel and Vicky Franklin left the metropolitan area of Oklahoma City; is that correct?

A. Well, I know Miguel was going to Colorado, but I didn't know where she was going or if she went anywhere or not.

Q. All right. But at some point, your brother left Oklahoma, and the next you heard about him was from your sister, Paquita, and she told you he was on trial for murder in San Antonio?

A. Well, she told my mother and father, and they told the rest of the family.

Q. So, is it fair to say that you know nothing about whether or not your brother is guilty of shooting to death on March 31st, 1979, two individuals by the name of Howard Powers and John Ebbert?

A. Could you say that again?

Q. Do you know anything about whether or not your brother, Miguel, is guilty of causing the deaths of Howard Powers and John Ebbert on March 31st of 1979?

A. No, I don't.

Q. So, if Mr. Cazier, and the record reflects that he was one of Mr. - or your brother's trial attorney, if Mr. Cazier had contacted you prior to your brother's trial for causing the deaths of these two individuals, you would not have been able to provide him any evidence that would show that your brother did not commit those crimes; is that correct?

A. Like I said, the only time - the last time I saw him was when he was going to Colorado.

Q. It's a real simple question. If Mr. Cazier had called you and said, Julio, I represent your brother Miguel. He is charged with shooting to death two security guards in San Antonio on the last day of March of 1979, could you have provided Mr. Cazier with any evidence whatsoever from any source which he could have utilized to show that Miguel Richardson did not shoot those two security guards?

A. Well, I couldn't, because I didn't see him after he left.

Q. Right. You know nothing about it.

A. No.

Q. Have you ever spoken with your brother about it?

A. No.

Q. Have you ever inquired of him how he came to be convicted and sentenced to death in San Antonio?

A. He never talked about those things.

Q. Have you ever asked him?

A. No.

Q. Has your brother ever told you, Julio, I am innocent of the crimes of which I have been convicted?

A. He just wanted to know how his family was doing.

Q. All right. That's nice to know. But the question was: Has he ever said to you, Julio, I'm innocent, I didn't commit the crime that has caused me to be incarcerated on death row?

A. No.

Q. Now, you say that you were not contacted by any of your brother's attorneys prior to trial; is that correct?

A. For this trial?

Q. No. Before the trial 16 years ago.

A. No.

Q. All right. Do you know or do you have any reason to believe that your brother ever told them where they could find you?

A. No. I don't know.

Q. All right. So as far as we know, those lawyers didn't even know where to find you; is that correct?

A. They could find me.

Q. If they knew where you were.

A. It's easy to find me.

Q. Right. But they would have to get that information from your brother, right?

A. Yes.

Q. And if he didn't tell them, then they are not going to be able to find you, right?

A. Right. I guess.

Q. He would have to tell them that you even existed; isn't that correct?

A. I don't know what he told them.

Q. Right. That's the whole point. Did you ever have any contact with your brother after his arrest and prior to his trial, either in person, on the phone, or through the mail?

A. Which trial?

Q. The one 16 years ago. That's the only trial we are concerned with.

A. No.

Q. You said that your father at some point stabbed your brother, Miguel?

A. Yes.

Q. Did your brother stab him back?

A. No.

Q. And you related that you were at one point the subject of sexual abuse committed upon you by your sister, Loleta.

A. Yes.

Q. All right. And you think that Miguel was also the victim of that; is that correct?

A. Yes.

Q. And you did not see that occur; is that correct?

A. I saw him go in the bathroom.

Q. But you weren't in there when whatever happened happened?

A. No.

Q. Did you ever talk to an individual by the name of Mr. Keith Burris prior to the 1981 trial?

A. I don't remember that name.

Q. Did you ever talk to an individual by the name of Mr. Bill Blagg?

A. I don't remember that name.

Q. Did you ever talk to an individual by the name of Joseph Janysek?

A. I don't remember that name.

Q. Did you ever talk to an individual by the name of Steven C. Hilbig?

A. No.

Q. Did you ever talk to any members of the Bexar County District Attorney's Office and relate to them these events that you have described, particularly the sexual assault committed upon you by your sister, Loleta?

A. When?

Q. In 1981.

A. I don't remember that date. I don't remember what happened on that date.

Q. All right. Did you ever tell anyone from the District Attorney's office from San Antonio that, look, my sister, Loleta, abused me, and I think she abused Miguel?

A. No.

Q. All right. Did you ever tell any members of the District Attorney's Office that, my father stabbed Miguel?

A. I never told anyone about my family's business.

Q. All right. So that information was never given to either the defense lawyers for your brother or the prosecutors for your brother?

A. No.

Q. Do you know anything about the incident which resulted in your brother being incarcerated in Federal prison?

A. When, at this --

Q. No. Years and years ago. Back in the early seventies. The welfare fraud deal. Do you know anything about that?

A. Yes. I remember when he went.

Q. Do you know if your brother ever abused drugs growing up with you in Oklahoma?

A. My brother was an athlete. He didn't want it. He always lifted weights and stuff. He took care of hisself.

Q. All right. So, there is no history of drug abuse with your brother as far as you know?

A. No.

Q. Do you know anything about the relationship your brother had with Victoria, or Vicky Franklin?

A. Well, he was dating her.

Q. Well, when he dated her, did he father a child with her? Do you know?

A. Not that I know of.

Q. Does he have any children?

A. Yes, he do.

Q. Do you know who the mothers are?

A. Well, I don't know. I know them, been knowing them forever, but I don't know their names. I've got her daughter with me right now.

Q. Do you know how many children he has?

A. One that I only know.

Q. And she lives with you?

A. No. She don't live with me. She came - I brought her down here to see her father.

Q. So she's here now, but she doesn't live with you?

A. No. She doesn't live with me.

MR. SHAUGHNESSY: May I approach the witness?

THE COURT: You may.

ON BEHALF OF THE STATE

BY MR. SHAUGHNESSY:

Q. During the course of your brother's trial in 1981, your sister, Paquita, was called as a witness to testify on his behalf.

A. Yes.

Q. By Mr. Cazier, his trial attorney. I would like you to read some pages of that testimony, starting at the top of page 129.

A. Are you going to read it? I can't read it.

Q. All right. I'm referring, for the benefit of counsel, to testimony elicited during the course of the punishment phase on September 16th, 1981 during the course of the testimony of a woman by the name of Paquita Richardson, who in her testimony identified herself as Miguel's sister. All right.

And she stated that she was just a couple of years younger than Miguel. And then the testimony starts developing, and Mr. Cazier starts asking questions. And he says: "Okay. When you were real small, where did you live?" And she answered, "We stayed - we had sort of like, a farm, and we had cows, one horse, which belonged to Miguel, and each child had his own pet. We had two ponds."

Question: "Let me ask you this, Paquita, did you live in the slums?" "No." "Were you poor?" "We were not poor. We had our own garden. Excuse me. We raised our own vegetables. We had a few hogs. And from time to time, my father and I and the rest of the children went to slaughter the hogs and freeze them. We had our own. We were pretty self-supporting. We ate well. We were happy, and we had a couple of tree houses. And we played. We were very close and had a childhood, a normal childhood, of course."

Now, is Paquita Richardson, when she testifies to that effect, that she and her family, her brothers and sisters had a normal childhood, is she incorrect?

A. Well, it depends on how - who is she - how can I say it? Who is she putting it next to, whose family she had to see. I had to see what is normal. What is the normal family or how kids are raised? I don't know. I just know how I was raised.

Q. Well, did you think when you were being raised that you were in an abnormal family?

A. They always told us they loved us when they whipped us.

Q. All right. Are they still alive today?

A. Yes, they are.

Q. Do they know you are here today?

A. Yes, they do.

Q. Are they here?

A. No.

Q. Have any of your other brothers and sisters been convicted of murder?

A. No.

Q. Have any of your brothers and sisters been convicted of felonies to your knowledge?

A. I'm not sure, really.

Q. Have you ever been convicted of a felony?

A. No.

Q. Are any of your other brothers and sisters presently incarcerated in prison in any state that you know of?

A. No.

Q. If it can be said that your brother was abused by his father, and mother, and older sister, do you have any knowledge whatsoever that would indicate that that abuse caused him to kill Howard Powers and John Ebbert on March 31st, 1979?

MS. KEANE: Your Honor, I object to that line of questioning. That's a question for an expert.

THE COURT: That's overruled.

ON BEHALF OF THE STATE

BY MR. SHAUGHNESSY:

Q. Let me rephrase. Do you know of anything that ever happened to Miguel when you were growing up with him that would cause him to kill two unarmed security guards?

MS. KEANE: I renew the objection, Your Honor.

THE COURT: Overruled.

THE WITNESS: Would cause him to kill someone?

MR. SHAUGHNESSY: Would cause him to kill two people.

THE WITNESS: I can't see my brother doing that because what he always taught me. My brother, to me, was like my father, and Loleta was like my mother. Right now today, to me my father is just an authority figure and my mother is just an authority figure. I don't know how I love her or nothing. I don't know. So I can't see what my parents did to us to commit anyone to do some type of murder, because we were raised in a Christian home in what we thought was a good family or a normal family. We wasn't sure because we didn't have anything to relate to because we was always together and there wasn't no families around. We couldn't have friends over. We couldn't go spend the night with no one. So we didn't really know. I was told that I was abused. I didn't know.

BY MR. SHAUGHNESSY:

Q. And you were told when?

A. Well, I was asking, you know - Well, some lawyers came down and just talked to me about --

Q. Lawyers for who?

A. For Miguel's lawyers.

Q. So, is it my understanding that you have now come to a conclusion that you may have been the subject of abuse after you discussed the incidents with lawyers for your brother?

A. I never said I was abused.

Q. All right. Have you come to the conclusion that you lived in an abusive household after it was suggested to you by lawyers for your brother?

A. I'm not a judge, because I don't know really if I was abused or if it's abuse. If you look at it as abuse, I don't know however it is abuse. To me, I felt, when I saw my brother and my family whip - my sisters and brothers getting hurt, it didn't feel too good to me when I was a kid. It hurt me really bad. That I told on him when he got stabbed, I felt it was my fault that he got stabbed. So I don't know. I don't know.

Q. All right. Well, let me back up. Prior to discussing these incidents with your brother's lawyers, and when I say lawyers, I mean his current lawyers.

A. Right.

Q. Did you think in your own mind that Miguel grew up in an abusive household?

A. Well, the age I am now and what I know now, yes, I do.

Q. All right. But before, I mean ten years ago, did that thought exist?

A. Well, I don't think that he should have been whipped like he was.

Q. All right. But, put that aside. Did you consider or did you believe that he grew up in an abusive household prior to discussing these incidents with his lawyers?

A. Well, I already knew that it was wrong, but then I thought everybody got the same punishment at those times. I thought every parent did their kids the same way. I didn't know. I don't know.

Q. Now, during the course of the punishment hearing, Mr. Cazier went on to ask certain questions of your sister, Paquita, regarding Miguel's schooling. I'm referring to page 131 of that same volume. And Mr. Cazier asked her:

"Was there any real racial conflicts at Dell City when you and Miguel were going there?" Answer: "Never." Question: "Did Miguel get along well with the other students?" Answer: "Yes. He had a lot of friends. Everybody liked him."

Question: "How did he do?" "He was an average student." "Did he participate in sports?" "He played football and the coach thought he was an excellent player."

Is your memory of your brother's experiences in high school different than what Paquita testified to in 1981?

A. All I know about Miguel in his school was about that when he came home and the injuries he had, or what my father said, he had to go get him, and I saw him drunk. The things I said. I don't know how good an athlete Miguel was in school, because I wasn't in his school. I didn't go to that school.

Q. So your only memory of Miguel and how he did or how he got along in school was that he came home with injured hands on one day. Is that your recollection of it?

A. Well, I know that Miguel was well liked by everybody that I had known. I never heard anyone talk bad about him. I didn't know - I know he would tell me they would pick on him or try to get him to do stuff, like dare you, or dares, get you to do things like that. But as far as, you

know, what year he played football or how good he was in football, I know he was a good athlete because I know my brother at home and how he was and everything. He was always good.

Q. All right. But I would like to back up. I think I heard you testify that your brother came home one day from school with broken hands; is that right?

A. Right.

Q. And could you elaborate on that? When was that and what is your memory?

A. I remember that it had to be in the 10th, 11th grade, somewhere in there, because Pleasant Hill goes to the 9th grade. And I remember that he went to Dell City. I don't remember. I'm not really sure, remember Ki-Ki going to Dell City, but she said she did. I don't remember.

Q. Then one day what happened with these broken hands or these injured hands? What happened?

A. I don't remember.

Q. Your brother just came home with these injuries? Is that it?

A. Yes. That's all I know. That's the time he got drunk or something. They got him drunk and he got into a fight with them. They tried to get him drunk and beat him up. That's all I know.

Q. All right. But you didn't see the fight, right?

A. No.

Q. And the possibility exists that the other individual he fought with may have suffered more serious injuries? Is that possible?

A. Well, my brother was always a good fighter, so it could have been. He didn't tell me that he hurt anyone or not.

Q. Did Miguel attend church on a regular basis when he was growing up?

A. If you lived at my Dad's house, you had to go to church no matter what age you are, every Sunday.

Q. That was for, what, 13 or 14 years?

A. Until he left home.

Q. Sang in a choir?

A. Yes.

Q. Did you sing in a choir with him?

A. I couldn't read.

MR. SHAUGHNESSY: No further questions.

MS. KEANE: No further questions, Your Honor.

THE COURT: Thank you. You are excused.

THE WITNESS: Thank you.

* * * * * *

(WHEREUPON, at this time, the Witness was excused.)

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THE COURT: We'll start again tomorrow at 9:00 o'clock.

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RECESS

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EX PARTE MIGUEL A. RICHARDSON

Habeas Corpus Application

WRIT NO. 29,821-02

from BEXAR County

DISSENTING OPINION

This is a post-conviction application for writ of habeas corpus filed pursuant to Tex. Code Crim. Proc. Ann. art. 11.071.[1] Applicant presents a claim for relief based upon

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[1] The procedural history of applicant's case is as follows:

- Defendant was convicted of capital murder in Bexar County on Sept. 10, 1981.
- We affirmed, 744 S. W .2d 65 (Tex. Ct. App. 1987).
- On petition for writ of certiorari, the United States Supreme Court vacated and remanded, 492 U.S. 914, 109 S.Ct. 3235.
- On remand, we again affirmed, 886 S.W.2d 769 (Tex. Ct. App. 1991).
- On petition for writ of certiorari, the United States Supreme Court again vacated and remanded. 113 S.Ct. 3026.
- On remand, we again affirmed, holding that: (1) evidence of defendant's voluntary service and kindness to others, artistic and poetic talent, and religious devotion, did not require separate special jury charge during punishment phase; and,

a belief that his "constitutional rights to the effective assistance of counsel, to present mitigating evidence, and to due process and a fair trial were violated by the trial court's allowance of the testimony of Dr. Rast, a surprise witness."[2] Believing this claim should be remanded to the habeas court for findings of fact in light of Estelle v. Smith, 602 F.2d 694 (5th Cir. 1979), I dissent.

Originally the State had filed a witness list with no doctors, psychiatrists or psychologists designated. Upon inquiry from the defense, the State amended the witness list to include Dr. Grigson and Dr. Schroeder as expert witnesses. However at trial, the State did not call either of these designated expert witnesses; instead, the State called Dr. Rast, who was not on the State's witness list. The defense objected stating:

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(2) allegedly mitigating evidence of defendant's character and upbringing did not require separate special jury charge. 901 S.W.2d 941 (Tex. Ct. App. 1994).

• Certiorari was denied June 26, 1995. 115 S.Ct. 2617.

2 Contrary to the trial judge's assertion that this claim for relief was raised and rejected on direct appeal, this issue was never raised under the constitutional parameters of the Sixth and Fourteenth Amendments.

> The Defendant has never been apprised that this gentlemen on the witness stand will be a witness. We don't know who he is. We don't know what he is. I've never heard his name before it was called by the prosecutor to bring the man into the courtroom. We are surprised. We are not prepared to meet, explain or rebut his testimony, whatever it may be. We have no idea what it may be. I understand the man may be a psychologist.

R. Vol. VII, pp 184-85.

The defense cited Smith v. Estelle, 602 F.2d 694, 699 (5th Cir. 1979), aff'd on other grounds, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), as support against the surprise testimony of Dr. Rast. In Smith, the Fifth Circuit affirmed the district court's granting of habeas relief, holding the testimony of the surprise witness, Dr. Grigson, violated Smith's Sixth and Fourteenth Amendment rights to the effective assistance of counsel, his Eighth Amendment right to present mitigating circumstances, and his Fifth Amendment right not to be forced to incriminate himself. Id. 602 F.2d at 698. The Fifth Circuit held:

> Surprise can be as effective as secrecy in preventing effective cross-examination, in denying the "opportunity for (defense) counsel to challenge the accuracy or materiality of " evidence, Gardner v. Florida, 430 U.S. at 357, 97 S.Ct. at 1204, and in

> foreclosing "that debate between adversaries (which) is often essential to the truth-seeking function of trials," Id., at 360, 97 S.Ct. at 1206 . . . . And despite the trial court's order that the state's attorney list "all the State's witnesses whom he in good faith expects to use at the trial of the State's case in chief, both during the guilt or innocence state (sic) and the punishment stage," App. 97, the prosecution did not list Dr. Grigson's name. The consequences of this surprise were devastating. Thus the trial judge's informality and the prosecution's tactics combined to give Smith's attorney's no chance to prepare an effective response to Dr. Grigson's testimony or to impeach it in any significant way. Surprise in this case impaired "the interest in reliability," Id. at 359, 97 S.Ct. 1197 as much as secrecy did in Gardner.

Smith, 602 F.2d at 700-01.

The difference between Smith and the instant case is that Dr. Rast did not interview applicant, but instead offered an opinion of a hypothetical defendant who committed exactly the sane offense as applicant. However, the reasoning of the Fifth Circuit applies here. Defense counsel was completely surprised by Dr. Rast and objected on the record, stating he was unprepared to cross-examine the surprise witness. In fact, the trial judge acknowledged defense counsel was fully prepared to cross-examine the listed witnesses,

stating, "I know you were loaded for bear on the other two doctors." R. Vol. VII, pp 197-98.

With these comments, I dissent.

BAIRD, Judge

Overstreet J., joins this opinion but also believes the first and seventh claims for relief should be filed and set.
Delivered: June 10, 1998
En Banc
Do Not Publish

81-CR-1548-W1

EX PARTE: § IN THE DISTRICT COURT

MIGUEL RICHARDSON, § 175TH DISTRICT COURT

Petitioner § BEXAR COUNTY, TEXAS

PROPOSED ORDER

The petitioner,[1] Miguel Richardson, through his appointed attorney, Daniel Lane, has filed an application for a post-conviction writ of habeas corpus under the provisions of Art. 11.071, Tex. Code Crim. Proc. Ann. (Vernon Supp. 1997) collaterally attacking, for the first time, his conviction for the offense of Capital Murder and a sentence of death.

Procedural History
Of The Case

On May 20, 1981, Richardson was indicted by a Bexar County grand jury for the March 31, 1979, murder/robbery of John G. Ebbert. Trial commenced on September 2, 1981 before Judge Preston H. Dial, Jr. On September 16, 1981, Richardson was found guilty of the offense of charged in the indictment. On September 18, 1981, the jury answered the statutory special issues adversely to Richardson and the death penalty was assessed.

An appeal was undertaken and on October 28, 1987, Richardson's conviction and sentence were affirmed by the Court of Criminal Appeals. Richardson v. State, 744 S.W.2d 65 (Tex. Crim. App. 1987). On July 3, 1989, the Supreme Court vacated the judgment of the Court of Criminal Appeals

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[1] Hereinafter referred to as Richardson.

and remanded the case for further review. Richardson v. Texas, 492 U.S. 914, 109 S.Ct. 3235, 106 L.Ed.2d 583 (1989). On June 12, 1991, the Court of Criminal Appeals affirmed the judgment a second time. Richardson's motion for rehearing was denied on September 18, 1991. On June 28, 1993, the Supreme Court of the United States once again vacated the judgment of the Court of Criminal Appeals and remanded the course for further consideration. Richardson v. Texas, 509 U.S. 917, 113 S.Ct. 3026, 125 L.Ed.2d 715 (1993). On June 1, 1994, the judgment was affirmed for the third time by the Court of Criminal Appeals. Richardson v. State, 901 S.W.2d 941 (Tex. Crim. App. 1994). On June 26, 1995, the Supreme Court denied Richardson's petition for writ of certiorari. Richardson v. Texas, _____U. S. _____,115 S.Ct. 2617, 132 L.Ed.2d 859 (1995).

On June 27, 1996, Daniel M. Lane, Jr. was appointed to represent Richardson for purposes of filing the instant writ of habeas corpus. The instant writ was timely filed on December 17, 1996. On December 30, 1996, this Court entered a scheduling order and granted Richardson a hearing on five of his claims for relief. A hearing on the application commenced on April 29, 1997 and concluded on July 1, 1997.

The application for habeas corpus relief filed by Richardson contains fifteen claims for relief.[2]

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[2] References to the record of the trial will be cited as (T.R. _____). References to the record of the writ hearing will be cited as (W.R. _____).

Findings Of Fact And
Conclusions Of Law On
Petitioner's First Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 7)

In his first claim for relief Richardson claims this Court reversibly erred in excluding venireman William Noble. (T.R. III-156)

This allegation of error was raised and decided adversely to Richardson on direct appeal. Richardson v. State, 744 S.W.2d at pgs. 67 thru 71. Inasmuch as this claim for relief has been previously decided adversely to Richardson it cannot form the basis for relief in a post-conviction writ of habeas corpus. Ex. Parte Acosta, 672 S.W.2d 470 (Tex. Crim. App. 1984).

The petitioner's first claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Second Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 18)

In his second claim for relief Richardson claims that this Court erred in admitting at the punishment phase evidence of 1973 conviction from the United States District Court for the Western District of Oklahoma. (State's trial Exhibit no. 51) Richardson asserts that Exhibit no. 51 reflects a conviction that was rendered null and void because it has been set aside under the terms of the now-defunct, Federal Youth Corrections Act.

This allegation of error was raised and rejected by the Court of Criminal Appeals on direct appeal. Richardson v. State, 744 S.W.2d at 82. Inasmuch as this claim for relief has been previously decided adversely to Richardson it cannot

form the basis for relief in a post-conviction writ of habeas corpus. Ex Parte Acosta, supra.

The petitioner's second claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Third Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 27)

In his third claim for relief Richardson claims that he was entitled to a special instruction pursuant to Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) so as to permit the jury to consider and give effect to all potential mitigating evidence.

This claim has been raised in the Court of Criminal Appeals on three separate occasions. It has been rejected on each and every one of these occasions. As a result it cannot form the basis for a post-conviction writ of habeas corpus. Ex Parte Acosta, supra.

Richardson also asserts that a en charge was required because his trial counsel was "chilled" by the pre-Penry holdings of the Court of Criminal Appeals. The petitioner relies on evidence presented, not at trial, but rather at the post-conviction writ of habeas corpus hearing. Evidence which could have been, but was not presented at the punishment phase of Richardson's trial, cannot support a claim that a Penry charge was erroneously denied. Ex Parte Goodman, 816 S.W.2d 383, n.6 (Tex. Crim. App. 1991).

The petitioner's third claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Fourth Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 50)

In his fourth claim for relief Richardson claims that this Court erred in allowing the prosecution to present the testimony of Robert Rast, a "surprise witness," resulting in a denial of his right to effective assistance of counsel and due process of law.

This complaint was raised and rejected by the Court of Criminal Appeals on direct appeal. Richardson v. State, 744 S.W.2d at pgs. 76 thru 78. As a result it cannot form the basis for relief on a post-conviction writ of habeas corpus. Ex Parte Acosta, supra.

The petitioner's fourth claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Fifth Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 8)

In this claim for relief petitioner asserts that the methods employed by the Texas Department of Criminal Justice[3] in carrying out executions[4] present an undue risk of unnecessary and tortuous pain in violation of the Eighth Amendment's prohibition against cruel and punishment.

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3 T.D.C.J.

4 Art. 43.14, Tex. Code Crim. Proc. Ann. (Vernon Supp. 1997).

The petitioner's claim is foreclosed by the holding of the Court of Criminal Appeals in Ex Parte Granviel, 561 S.W.2d 503 (Tex. Crim. App. 1978) wherein the Court held:

> Petitioner, who had the burden of proof at the habeas corpus hearing, offered no persuasive proof that execution by intravenous injection of a lethal substance is inherently cruel and inhumane. He now argues, however, that possible complications in the intravenous injection procedures might, cause additional pain to the condemned prisoner. We conclude that that possibility, should it arise, does not make the means of inflicting death inherently cruel. Rather, it could be characterized as a possible discomfort or suffering necessary to a method of extinguishing life humanely.
> Ex Parte Granviel, id, at pg. 510.

The petitioner claims that the holding of Granviel is not applicable to him because of evidence which has come to light since 1978 when Granviel was decided.

The evidence, according to Richardson, reveals that the methodology employed by T.D.C.J. creates an undue risk of unnecessary pain and suffering during the course of an execution. In support of that contention Richardson brought forth the testimony of two witnesses, Dr. Edward Brunner and Deborah Denno.

Dr. Brunner was an anesthesiologist and pharmacologist who testified that if the drugs utilized by T.D.C.J., in carrying out an execution, were to be administered in an insufficient dose or improper sequence than a possibility could arise in which the inmate could suffer "unusual pain and suffering in the process of the execution." (W.R. III-88) Dr. Brunner did not testify that T.D.C.J. employed the wrong sequence or utilized insufficient dosages

of the required drugs. on the contrary, Dr. Brunner testified that he had a specific knowledge of T.D.C.J.'s procedures being deficient in either of those respects. (W.R. III-134, 135, 143) He also related that if used correctly the drugs utilized by T.D.C.J. would be appropriate for carrying out an execution without the unnecessary risk of pain and suffering. (W.R. 111-122, 130)

Dr. Brunner also expressed his opinion that if a given individual had excessive scarring of his veins then a possibility could arise that an improper flow of the drugs could pose a risk of undue pain and suffering. (W.R. III-53, 54) However, it was also established that Dr. Brunner had examined Richardson and concluded that Richardson did not suffer from the type of scarring that could pose the risk in question. (W.R. III-140, 141)

Professor Deborah Denno was a criminologist employed by Fordham University. (W.R. IV-264) Professor Denno was of the opinion that, based upon her studies, the State of Texas' method of execution had resulted in eleven "botched" executions since 1982. (W.R. IV-302) This record, of what are characterized as "botched" executions, led Professor Denno to conclude that the lethal injection procedures employed by the State of Texas create a "substantial and unnecessary risk of extreme pain and prolonged suffering." (W.R. IV-293) During the course of her testimony it was established that Professor Denno's study consisted primarily of reading newspaper accounts of executions carried out by the State of Texas. (W.R. IV-285, 335, 336, 341) It was also established that Professor Denno did not "have any idea how the State of Texas executes anybody." (W.R. IV-394) When asked how the State of Texas could compile an execution protocol which would eliminate her perceived risk of undue pain, Professor Denno responded in a very telling manner. She stated:

> I would say, first of all, and I'm not an expert on how an individual should be executed, and that the State of Texas should get experts who know something. Because from what I can tell, they haven't done that. There is nothing to suggest that they have gone to medical experts to have them devise their protocol. And I would suggest that they start going to somebody who is an expert and not somebody like myself. (W.R. IV-396, 397) (emphasis added)

In Ex Parte Granviel, id., the Court of Criminal Appeals concluded that the possibility that the procedures employed in carrying a lethal injection might result in pain to the condemned did not render the procedure constitutionally infirm. The evidence produced by Richardson establishes nothing more than that presented in Ex Parte Granviel: a possibility of pain during the procedure.

The petitioner's fifth claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Sixth Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 55)

In his sixth claim for relief Richardson advances a contention that his execution is barred because the time which has elapsed since his conviction amounts to cruel and unusual punishment.

Findings of Fact

An adequate chronology of the procedural history is contained in petitioner's exhibit no. 28 which was admitted at the post-conviction writ hearing. (W.R. V-614) The exhibit is incorporated herein. Two other matters of importance were established during the course of that hearing. First, with the

exception of extensions of time sought by the State to reply to his pleadings, in either the Supreme Court of the United States or the Court of Criminal Appeals, all the time which elapsed between February 23, 1988 and July 5, 1995 was due solely to efforts lodged by the petitioner to have his conviction and/or sentence reversed by the Supreme Court (on petition for writ or certiorari) or the Court of Criminal Appeals (on remand from the Supreme Court). (W.R. V-637) Secondly, the record is wholly devoid of any evidence which even remotely suggests that the petitioner ever communicated his concerns over the time being taken to resolve his case, to the Court of Criminal Appeals or the Supreme Court.

The petitioner characterizes the time which has elapsed since the original affirmance as delay. This Court declines to characterize it as such. From all indications, the time taken to resolve the issues so far presented, was due primarily to the complexity and uniqueness of the legal issues presented. Although the issues were ultimately decided adversely to Richardson that does not translate into a claim of cruel and unusual punishment on the basis of a perceived delay.

Conclusions of Law

The claim advanced by the petitioner has been uniformly rejected in all forums in which it has been pursued. See: Carter v. Johnson, 110 F.3d 1098 (5th Cir. 1997); White v. Johnson, 79 F.3d 432 (5th Cir. 1996); Stafford v. Ward, 59 F.3d 1025 (10th Cir. 1995), cert. den. _____ U.S. _____, 115 S.Ct. 2640, 132 L.Ed.2d 896 (1995); McKenzie v. Day, 57 F.3d 1461 (9th Cir. 1995); adopted by Court en banc 57 F.3d 1493 (9th Cir. 1995); State v. Smith, 931 F.2d 1272 (Mont. 1996). This Court rejects the claim for the reasons set forth in the above-cited authorities.

The petitioner's sixth claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Seventh Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 8)

In his seventh claim for relief Richardson asserts that his "constitutional rights" were violated by this Court's refusal to submit an instruction to the jury regarding the law of parole eligibility.

At the conclusion of the punishment phase of the trial counsel for Richardson submitted "Defendant's Special Requested Charge On Punishment No. Six." That charge stated as follows:

> "During your deliberations as to the answers to be given to the special issues, you are not to consider how much of his sentence the Defendant would be required to serve before being released on parole, if his punishment is assessed at life imprisonment. You are instructed, however, that under the law, a person who is serving a sentence of life imprisonment for the offense of Capital Murder may not be considered for release on parole until his actual calendar time served, without consideration of good conduct time, is twenty (20) years." (T.R. I-218)

The trial judge denied the requested charge after considering argument from Richardson's trial counsel. (T.R. VII-281, 282)

The Court of Criminal Appeals has consistently and uniformly held that parole eligibility instructions are not required at the punishment phase of a capital murder trial. Morris v. State, 940 S.W.2d 610 (Tex. Crim. App. 1996); Green v. State, 934 S.W.2d 92 (Tex. Crim. App. 1996); Martinez v. State,,924 S.W.2d 693 (Tex. Crim. App. 1996);

Smith v. State, 898 S.W.2d 838 (Tex. Crim. App. 1995). The requested instruction was properly denied.

Petitioner's seventh claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Eighth Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 85)

In his eighth claim for relief Richardson claims that this Court erroneously denied a motion to suppress and allowed for the admission into evidence the product of an illegal search.

This issue was raised on direct appeal and decided adversely to the petitioner. Richardson v. State, 744 S.W.2d at pp. 84, 85. As a result it cannot form the basis for relief on a post-conviction writ of habeas corpus. Ex parte Acosta, supra.

The petitioner's eighth claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Ninth Claim For Relief.
(Petitioner's Writ Of Habeas Corpus, pg. 90)

In his ninth claim for relief Richardson avers that this Court violated his "constitutional rights" by limiting his cross-examination of a State's witness (Rhonda Bearden) and by refusing to compel the testimony of two witnesses for the defense (the victims of an extraneous offense committed by Bearden).

This issue was raised and rejected on direct appeal. Richardson v. State, 744 S.W.2d at pgs. 78, 79, 80. Therefore,

it cannot form the basis for relief on a post-conviction writ of habeas corpus. Ex parte Acosta, supra.

The petitioner's ninth claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Tenth Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 95)

In his tenth claim for relief the petitioner asserts that his appearance in leg shackles, visible to the jury, violated his right to the presumption of innocence and a fair and impartial jury.

The scheduling order entered by this Court on December 30, 1996, granted the petitioner's request for a hearing on this issue. The petitioner presented no evidence in support of this contention at the hearing on his petition for writ of habeas corpus.

In his pleadings Richardson cites to the only two occasions in the record where shackles are mentioned. Because of their brevity the Court will quote them in their entirety. On the morning of September 2, 1981, the trial Court conducted a hearing on a motion to suppress evidence. This hearing was conducted prior to the initiation of the voir dire process. (T.R. II-105 thru 145) At the conclusion of that session of Court the following unfolded:

> MR. CAZIER: Judge, the one last thing is this. As Your Honor, knows, I would like the record to reflect the defendant has appeared at all pre-trial hearings in leg shackles. We move the Courts, request the Court that those shackles be removed at all times when the jury panel and jury is in the hallway or in this Court. that the defendant not be required to be in the view of

the jury in handcuffs and specifically in leg shackles or leg irons as he is now wearing.

THE COURT: It is the policy of this Court and my bailiffs are very efficient in carrying out those instructions, that no defendant be displayed before jurors in any sort of handcuffs or shackles. And I'm satisfied that they will continue to see that is done.

I know that there are particular security episodes in the history of this defendant that warrant the sheriff taking unusual precautions. I'm not going to impede that in any way, but my bailiffs will see that the defendant is either brought in before the jury is around or after the jury is around so they will not be viewed. They will not view him in any sort of restraint.

MR. HINDMAN: (COURT BAILIFF) Chief Talbert has placed him in the hands of two other officers throughout this and that's the reason we have two others and they give him official transportation and remain with him the whole time. They are here. This best be directed to them.

THE COURT: You have heard the instructions.

SHERIFF'S DEPUTIES: We'll bring them earlier and remove them.

THE COURT: You can bring him earlier and make sure it's well before any jurors are around, and Joe and Bob can tell you where jurors are because we will be having a few of them up in our jury room from time to time. But I think the request is appropriate. Now, anything further? All right, we'll recess.
(T.R. II-145, 146, 147) (emphasis added)

The record reflects that the Court granted the petitioner's request not to appear before the jury (or potential jurors) in leg shackles.

The only other reference to this issue occurred the following day during the course of the individual voir dire process. After one venireman was stricken by the prosecution, and prior to another entering the courtroom the following unfolded:

> MR. CAZIER: If the Court please. I would like the record to reflect that during the recess the sheriff deputy has applied a large leg brace to the right leg of Mr. Richardson placed underneath his trousers and that he's reported to me that he's very uncomfortable.
>
> It cuts down on the circulation of the blood in his leg and that he cannot stand and he cannot walk other than straight legged. We object to his being required to wear this.
>
> THE COURT: My understanding on a brace such as this keeps the knee from bending, but it does not restrict circulation and cannot be seen or observed by anyone unless the defendant tries to move around. At this stage of the trial I will not require the sheriff to remove it. You may bring the next juror, please.
>
> MR. CAZIER: Note our exception.
>
> (T.R. 111-204)

The remainder of the trial was conducted without further mention of the leg brace.

The petitioner argues that the record supports a conclusion that he was denied his right to a fair trial, because he was denied his right to the presumption of innocence. The

Court, on the basis of the record before it, concludes just the opposite. The first time the issue arose was prior to the jury selection process at which time petitioner objected to appearing before the jury in shackles. This Court granted the request of petitioner's trial counsel and ordered that petitioner not appear in shackles before the jury or jury panel. No evidence was brought forth to demonstrate that the order of the Court was not complied with during the course of the trial. The second instance in which the issue of restraints arose concluded with the Court's observation that the leg restraint was not visible to anyone. Trial counsel did not refute the Court's observation but merely complained that the device was under petitioner's trousers and restricting his circulation.

After the trial was concluded petitioner filed a motion for new trial alleging, in part, that he was "denied a fair and impartial trial by virtue of the extraordinary security precautions taken during the course of the trial." (T.R. I-230) In support of that motion petitioner's trial counsel produced the testimony of his court-appointed investigator. (T.R. VII-343) The investigator related the following vis-a-vis the leg restraint:

> Q. During the course of the trial was the defendant, Mr. Richardson, required to wear a leg brace?
>
> A. Yes, he was.
>
> Q. Okay, I wonder if you could describe that brace for the record, please?
>
> A. The leg brace seemed like when somebody is injured or something. you wrap around — it was wrapped around his knee not allowing him to walk at a normal pace.
>
> Q. How did he walk?

A. Awkward like he was crippled or something like that.

Q. Was he able to bend his leg at the knee on the leg that he had the brace on?

A. No, he wasn't.

Q. Was the brace visible through his clothing, at least to the extent that you could see the outlines of the brace under his pants?

A. It was bulky enough so you could see it through the outline of the pants.

Q. And was Mr. Richardson required to wear that leg brace?

A. At all times.

Q. At all times during the trial?

A. That's correct.

Q. Okay. (T.R. VII-345, 346)(emphasis added)

The motion for new trial testimony is devoid of any evidence that any member of the jury saw the outline of the leg brace. Furthermore, the testimony at the motion of new trial contains nothing that even remotely suggests that members of the jury violated the instructions of the Court and based their verdict on matters not in evidence.

In the absence of a showing that members of the jury were aware that petitioner was wearing a leg brace, and that the device was a security measure, the petitioner has not met his burden of demonstrating that his right to the presumption

of innocence was violated. Long v. State, 823 S.W.2d 259 (Tex. Crim. App. 1991), cert. den. _____ U.S. _____, 112 S.Ct. 3042, 120 L.Ed.2d 910 (1992); Caraway v. State, 550 S.W.2d 699 (Tex. Crim. App. 1977); Brown v. State, 877 S.W.2d 869 (Tex. App. San Antonio, 1994).

The petitioner's tenth claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Eleventh Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 97)

In his eleventh claim for relief Richardson asserts that his right to a fair trial was violated by this Court's admission into evidence "irrelevant and inflammatory extraneous offense and victim impact evidence."

The petitioner's eleventh claim for relief is substantively divided into two distinct issues the admission of victim impact evidence and what petitioner characterizes as extraneous acts of misconduct. The nature of the claims requires this Court address this issues as separate and distinct claims. The claim regarding "victim impact testimony" will be addressed first.

The victim impact evidence of which the petitioner complains revolves around the fact that the jury became aware during the course of the trial that, in addition to shooting and killing the complainant (John Ebbert) the petitioner at the same time, in the same place and in the same manner had shot to death the complainant's companion/associate (Howard Powers). The petitioner asserts that in allowing for the admission of this evidence this Court erroneously allowed for the admission of "victim impact" testimony. The petitioner's claim must fail for two reasons.

First, with respect to the evidence admitted at the punishment phase, there exists no constitutional prohibition against the admission of "victim impact" testimony. Ford v. State, 919 S.W.2d 107 (Tex. Crim. App. 1996). With respect to the use of this evidence during the course of the guilt-innocence phase of the trial, the murder of Powers was inextricably intertwined with the simultaneous murder of Ebbert, hence admissible as "contextual" evidence. See: Lawton v. State, 913 S.W.2d 542 (Tex. Crim. App. 1995); Nelson v. State, 864 S.W.2d 496 (Tex. Crim. App. 1993); Camaco v. State, 864 S.W.2d 524 (Tex. Crim. App. 1993); Lockhart v. State, 847 S.W.2d 568 (Tex. Crim. App. 1992).

Richardson also claims that error arose at various times during the trial when evidence was adduced which tended to show that he was in San Antonio "pimping." This evidence was brought forth through the testimony of the prostitutes who were the object of the "pimping." Without belaboring the details it is sufficient to note that Richardson's occupation and its ramifications regarding his relationship with his clients (Franklin, Bearden, and Laursen) was admissible both as contextual evidence, and as proof of motive. See: Gosch v. State, 829 S.W.2d 775 (Tex. Crim. App. 1991), cent. den._____ U.S. _____, 113 S.Ct. 3035, 125 L.Ed.2d 722 (1993).

The petitioner's eleventh claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Twelfth Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 104)

In his twelfth claim for relief Richardson claims that his rights under the Eighth and Fourteenth Amendments to the United States Constitution were violated by the

instructions submitted to the jury at the punishment phase of the trial.

At the conclusion of the punishment phase the Court submitted the following instruction, which forms the basis of Richardson's allegation:

> You will answer each of these special issues either "yes" or "no."
>
> In order for the jury to answer a special issue "yes" the jurors must unanimously concur that the answer is "yes" beyond a reasonable doubt regarding that special issue.
>
> Any juror who entertains a reasonable doubt that the answer is "yes" as to a special issue shall vote "no" in the jury deliberations regarding that special issue. If ten or more jurors vote "no" in the jury deliberations as to a special issue, then the answer of the jury is "no" regarding that special issue. (T.R. I-221, 222)

The petitioner advances the argument that the jury should have been informed that a single juror had the ability to answer one of the special issues "no" hence mandating a hung jury and a life sentence rather than a sentence of death. The argument asserts that the failure to inform the jury of this aspect of the law amounts to a violation of the Eighth Amendment. The petitioner's argument has been consistently rejected by the Court of Criminal Appeals. Johnson v. State, _____ S.W.2d _____ (No. 78,046, Tex. Crim. App., April 30, 1997); Shannon v. State, 942 S.W.2d 591 (Tex. Crim. App. 1996); Eldridge v. State, 940 S.W.2d 646 (Tex. Crim. App. 1996); Rousseau v. State, 855 S.W.2d 666 (Tex. Crim. App. 1993).

The petitioner's twelfth claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Thirteenth Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 108)

In his thirteenth claim for relief Richardson claims that he. was denied his right to due process of law because the charge of the Court, at the guilt-innocence phase of the trial, erroneously defined the culpable mental state necessary for the offense of Capital Murder.

At the conclusion of the guilt-innocence phase of the trial, the trial judge submitted an instruction to the jury which included the following definition of "intentionally."

> A person acts "intentionally," or with intent, with respect to the nature of his conduct or to a result of this conduct when it is his conscious objective or desire to engage in the conduct or cause the result. (T.R. I-90)

The charge also contains the following instructions:

> Before you would be warranted in convicting the defendant of capital murder, you must find beyond a reasonable doubt not only that on the occasion in question that the defendant, was engaged in the commission of the offense of robbery, of John G. Ebbert, but also during the commission of the robbery the defendant shot the deceased with a gun with the intention of thereby killing John G. Ebbert.
>
> Unless you find from the evidence beyond a reasonable doubt that the defendant, on the occasion

in question, specifically intended to kill the said deceased when he shot John G. Ebbert, if he did shoot John G. Ebbert, you cannot convict him of the offense of capital murder.

* * * * * * *

Now if you find from the evidence beyond a reasonable doubt that on or about March 31, 1979, in Bexar County, Texas, the defendant, Miguel A. Richardson, did intentionally or knowingly cause the death of John G. Ebbert, by shooting the said John G. Ebbert with a gun, and the said Miguel A. Richardson, did then and there intentionally cause the death of the said John G. Ebbert while in the course of committing or attempting to commit robbery of John G. Ebbert, you will find the defendant guilty of capital murder. (T.R. I-191) (emphasis added)

At the conclusion of the evidentiary portion of the guilt-innocence phase of the trial no objection was lodged to the charge on the grounds now alleged as reversible error. (T.R. VI-202 thru 206)

Petitioner now asserts that the charge is erroneous because the definition of "intentionally" is not limited to "causing the result" but erroneously includes "engaging in the conduct" language. See: Cook v. State, 884 S.W.2d 485 (Tex. Crim. App. 1994)(Error not to limit the definition of culpable mental states in result-type offenses to the result of the defendant's action, to the exclusion of the conduct itself).

In the absence of a timely and specific objection to the charge a reversal is not mandated unless the accused suffered "egregious harm." Almanza v. State, 686 S.W.2d 157 (Tex. Crim. App. 1984). Egregious harm has been defined as charge

error which denies the defendant a "fair and impartial trial." Arline v. State, 721 S.W.2d 348 (Tex. Crim. App. 1986).

The charge in question did not deprive the petitioner of a fair and impartial trial. The application portion of the charge mandated that the jury find a specific intention to kill and did not authorize a conviction for engaging in the conduct of firing the weapon. Moreover, an examination of the arguments following the guilt-innocence phase reveals that, at no time, did counsel for either side make reference to the Court's definition of the culpable mental state. (T.R. VI-212 thru 246) Under the facts of this case Richardson did not suffer egregious harm. Patrick v. State, 906 S.W.2d 481 (Tex. Crim. App. 1995); Hughes v. State, 897 S.W.2d 285 (Tex. Crim. App. 1994); Turner v. State, 805 S.W.2d 423 (Tex. Crim. App. 1991); Cantu v. State, 842 S.W.2d 667 (Tex. Crim. App. 1992).

The petitioner's thirteenth claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Fourteenth Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 110)

In his fourteenth claim for relief Richardson asserts that he was denied effective assistance of counsel at trial and on appeal.

Richardson details three putative failures on the part of trial counsel:

i) Counsel failed to pursue exculpatory evidence (petition, pg. 111);

ii) Counsel failed to secure a fair and impartial jury (petition, pg. 114);

iii) Counsel erred during course of trial (petition, pg. 118).

The constitutional standard for determining whether a criminal defendant has been denied the effective assistance of counsel, as guaranteed by the Sixth Amendment, was announced by the Supreme Court in the case of Strickland v. Washington:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.
> Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

The Strickland analysis has been expressly adopted by the Court of Criminal Appeals. Butler v. State, 872 S.W.2d 227 (Tex. Crim. App. 1984); Holland v. State, 761 S.W.2d 307 (Tex. Crim. App. 1988); cert. den. 489 U.S. 1091, 109 S.Ct. 1560, 103 L.Ed.2d 863 (1989); Hernandez v. State, 726 S.W.2d 53 (Tex. Crim. App. 1986).

In order to establish that his trial counsel's performance was constitutionally infirm, the defendant must demonstrate the counsel's representation fell below an

objective standard of reasonableness. Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); Chambers v. State, 903 S.W.2d 21 (Tex. Crim. App. 1995); Banda v. State, 890 S.W.2d 42 (Tex. Crim. App. 1994), cert. den. _____ U.S. _____, 115 S.Ct. 2253, 132 L.Ed.2d 260 (1995); Belyeu v. Scott, 67 F.3d 535 (5th Cir. 1995); cert. den. _____ U.S. _____, 116 S.Ct. 1438, 134 L.Ed.2d 559 (1996); Beets v. Scott, 65 F.3d 1258 (5th Cir. 1995). In order to defeat this presumption the defendant bears the burden of proof and must defeat a strong presumption that the performance of trial counsel falls within a wide range of reasonable legal assistance. Patrick v. State, 906 S.W.2d 481 (Tex. Crim. App. 1995); Garcia v. State, 887 S.W.2d 862 (Tex. Crim. App. 1994), cert. den. _____ U.S. _____, 115 S.Ct. 1368, 131 L.Ed.2d 223 (1995); Duff-Smith v. Collins, 973 F.2d 1175 (5th Cir. 1992), cert. den. _____ U.S. _____ 113 S.Ct. 1958, 123 L.Ed.2d 455 (1993); Black v. Collins, 962 F.2d 394 (5th Cir. 1992), cert. den. 504 U.S. 992, 112 S.Ct. 2983, 119 L.Ed.2d 601 (1993). Reviewing courts are required to review the performance of counsel from counsel's perspective at the time he acted (or failed to act) rather than through the use of hindsight. Ex Parte Kunkle, 852 S.W.2d 499 (Tex. Crim. App. 1993), cert. den. _____ U.S. _____, 114 S.Ct. 122, 126 L.Ed.2d 87 (1994); Solis v. State, 792 S.W.2d 95 (Tex. Crim. App. 1990); Williams v. Scott, 35 F.3d 159 (5th Cir. 1994); cert. den. _____ U.S. _____, 115 S.Ct. 959, 130 L.Ed.2d 901 (1995); Williams v. Collins, 16 F.3d 626 (5th Cir. 1994). A reviewing Court is not entitled to speculate as to the reasons why trial counsel acted as he did, rather a reviewing court must presume that the actions taken were taken as part of a strategic plan for representing the client. Jackson v. State, 877 S.W.2d 768 (Tex. Crim. App. 1994).

In reviewing claims of ineffective assistance of counsel, the standard to be applied is whether an accused received "reasonably effective" assistance. Brewer v. State,

649 S.W.2d 628 (Tex.Crim. App. 1976); Ex Parte Gallegol, 551 S.W.2d 510 (Tex. Crim. App. 1974). The sufficiency of assistance is to be gauged by the totality of representation and the fact that another attorney may have pursued a different tactic at trial is insufficient to prove a claim of ineffective assistance of counsel. King v. State, 649 S.W.2d 42 (Tex. Crim. App. 1983); Boles v. State, 598 S.W.2d 274 (Tex. Crim. App. 1970). Isolated instances of error on the part of trial counsel will not support a claim of ineffective assistance of counsel. Archie v. State, 615 S.W.2d 762 (Tex. Crim. App. 1981); Riles v. State, 595 S.W.2d 858 (Tex. Crim. App. 1980); Earwin v. State, 582 S.W.2d 794 (Tex. Crim. App. 1979). In reviewing the question of whether counsel was not "reasonably effective," the deficient performance prong of the Strickland test, the reviewing court is required to determine whether counsel's alleged errors were so egregious that counsel was not functioning in a manner envisioned by the Sixth Amendment. Gosch v. State, supra.

The prejudice which comprises the second component has also been defined. The Court states that "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland v. Washington, supra, at S.Ct. 2069, 2070. In sum, if no prejudice had been demonstrated, then the Sixth Amendment right to counsel has not been violated. Duff-Smith v. Collins, supra.

The accused has the burden of affirmatively proving prejudice. Strickland v. Washington, supra, at S.Ct. 2067. The prejudice envisioned by Strickland require a showing or more than an error which might have a conceivable effect on the outcome of the trial. Strickland v. Washington, supra, at S.Ct. 2067.

The Supreme Court has clarified what constitutes that prejudice prong of Strickland. In Lockhart v. Fretwell, _____

U.S. _____, 113 S.Ct. 838, 112 L.Ed.2d 180 (1993) the Court held that in order to establish the second prong of Strickland an accused must demonstrate that counsel's deficient performance renders the result of the trial "unreliable or the proceeding fundamentally unfair." Lockhart v. Fretwell, id., at S.Ct. 844. The proper analysis is one which focuses, not on the outcome of the proceedings, but rather on the fairness and reliability of the process in which guilt is determined. Lockhart v. Fretwell, id., at S.Ct. 842, 843. Vuong v. Scott, 62 F.2d 673 (5th Cir. 1995), cert. den. _____ U.S. _____, 116 S.Ct. 557, 133 L.Ed.2d 458 (1995); Armstead v. Scott, 37 F.2d 202 (5th Cir. 1994); cert den. _____ U.S. _____, 115 S.Ct. 1709, 131 L.Ed.2d 570 (1995).

Finally, in analyzing a claim of ineffectiveness, the reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland v. Washington, supra, at S.Ct. 2069, 2070. Put in other words, this Court is entitled to review only the second prong of the two-pronged test in resolving this issue. Moreover, if it is easier to dispose of an ineffectiveness claim solely on the issue of prejudice to the appellant, that is the approach that should be followed. Strickland v. Washington, supra, at S.Ct. 2070.

Findings Of Fact And Conclusions Of Law On Petitioner's Three Claims Of Ineffectiveness

A.

In his first claim of ineffectiveness Richardson contends that his trial counsel was ineffective for failing "to pursue exculpatory evidence."

The petitioner's sole complaint under this particular claim is that trial counsel (Alan Cazier) failed to secure the testimony of a witness by the name of Laura Susan Vit. The petitioner makes reference to an exhibit attached to his petition (Exhibit H) and asserts that if the statement is true it could have provided him with evidence which was exculpatory in nature.

The exhibit which petitioner refers to is not before this Court for purposes of passing on the merits of Richardson's claim. Petitioner asked for and was granted by this Court a hearing on his claim of ineffective assistance. At no time during the course of the hearing did petitioner attempt to offer Exhibit H into evidence. Moreover, at no time did this Court indicate, explicitly or implicitly, that it would consider any of the exhibits attached to the petition as substantive evidence for purposes of the hearing. See generally: Art. 11.071, § 9(a), Tex. Code Crim. Proc. Ann. (Vernon Supp. 1997).

Furthermore, Richardson asserts that if the statement by Vit is true than it would constitute potential exculpatory evidence. There are two shortcomings in Richardson's argument. First, because he has the burden of proof in this proceeding, he was required to demonstrate that the statement was true, not that it might have been true. Secondly, even if the statement is true it presents a situation in which it could prove to be inculpatory in certain respects. More particularly, it arguably bolsters the State's theory that Richardson attempted to gain entry to Vit's room prior to the shooting of Powell and Ebbert, which occurred shortly thereafter and a short distance away.

Assuming, without deciding, that Cazier's failure to obtain the testimony of Vit constitutes ineffective assistance of counsel, nevertheless Richardson has not demonstrated that Vit's failure to testify rendered the guilty verdict unreliable or the guilt-innocence phase of the trial fundamentally unfair. In

short, petitioner has not met his burden of proving that he was prejudiced as defined by law. See: Johnson v. Scott, 68 F.3d 106 (5th Cir. 1995), cert. den., _____ U.S. _____, 116 S.Ct. 1358, 134 L.Ed.2d 525 (1996).

B.

In his second claim of ineffective assistance, Richardson asserts that trial counsel "failed to secure a fair and impartial jury." Commingled with this claim are various claims relating to the failure of appellate counsels.[5] The petitioner cites to seven purported failures on the part of his counsel.

First, Richardson complains that counsel failed to appeal the denial of his pre-trial motion for change of venue. Prior to trial, counsel failed a written "Motion for Change of Venue." (T.R. I-39 thru 43) A hearing was conducted on that motion on August 13, 1981. (T.R. II-32 thru 71) In support of his motion counsel presented the testimony of six witnesses. At the conclusion of the hearing the motion was denied. (T.R. II-71) The denial of the motion was not raised as a ground of error on direct appeal. The petitioner claims that the failure to raise the issue on appeal amounts to ineffective assistance of counsel.

The petitioner has failed to demonstrate that this Court's ruling of August 13, 1981 was erroneous, as a result ineffectiveness has not been shown. In order to demonstrate that the ruling of this Court was erroneous and constituted reversible error it must be shown that the ruling constituted an abuse of discretion. Willingham v. State, 897 S.W.2d 351 (Tex. Crim. App. 1995). The petitioner has failed to so demonstrate. As a result he has failed to demonstrate that he

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5 Alan Cazier served as both trial and appellate counsel.

was prejudiced by counsel's failure to raise the issue on direct appeal. See generally: Powell v. State, 898 S.W.2d 821 (Tex. Crim. App. 1994); Narvaiz v. State, 840 S.W.2d 415 (Tex. Crim. App. 1992).

In his second claim of ineffectiveness, in this context, Richardson asserts that trial counsel erred by failing to obtain a sequestered jury so as to avoid improper media exposure during the trial. In support of his claim Richardson asserts that he "will show at a hearing" that the jury was exposed to a "great deal of prejudicial media coverage" during the trial. No such evidence was brought forth during the course of the hearing.

Included in the Court's written instructions to the jury was the following admonishment:

> During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you.

Moreover, prior to the commencement of testimony, the trial judge orally admonished the jury in the following fashion:

> If there is anything to any of the news media about the case you are specifically instructed not to read it, not to watch anything on television about it, not to listen to anything on the radio about it. (T.R. V-11)

In the absence of any evidence to the contrary, this Court will presume that the jurors abided by these instructions and did not expose themselves to, or consider evidence of, reports in the media (if any such reports were ever made). In the absence of such proof Richardson has failed to meet his

burden of demonstrating that counsel was ineffective for failure to pursue his request for sequestration of the jury.

Petitioner also claims. that counsel was ineffective for failing to object to the State's raced-based peremptory strikes, and raise that issue on direct appeal. See: Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 260 (1986). The effectiveness of trial counsel is gauged against the law as it existed as the time of trial. Lockhart v. Fretwell, supra. At the time of petitioner's trial (June of 1981) the Supreme Court had not yet held that a case of race-based discrimination in the use of peremptory strikes could be shown on the basis of strikes utilized at a single trial. This holding did not arise until 1986 when Batson was decided. Inasmuch as this "right" did not arise until almost five years after the petitioner's trial, the petitioner has not shown that the failure to object was error on the part of Cazier. Lockhart v. Fretwell, supra.

It is also noteworthy that the petitioner is seeking a new trial on the grounds that the equal protection rights of the venireman were purportedly violated through the State's use of race-based peremptory strikes. See generally: Powers v. Ohio, 409 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); J.E.B. v. Alabama, 511 U.S. , 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994); Georgia v. McCollum, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992). The vehicle which petitioner is attempting to utilize in remedying this alleged wrong, a post-conviction writ of habeas corpus, is designed to grant new trials to individuals who can demonstrate that their conviction was obtained in violation of their constitutional rights. See generally: Ex Parte Sodberry, 864 S.W.2d 541 (Tex. Crim. App. 1993). Assuming arguendo that the State violated the holding of Batson in the exercise of its peremptory strikes, that fact does not translate into a demonstration that the conviction was obtained, in such a fashion as to violate the petitioner's rights under the Constitution.

Lastly, assuming again that the absence of an objection to the State's peremptory strikes constituted ineffective assistance of counsel (the first prong of Strickland) petitioner has not alleged, or proven, that he was prejudiced in the manner envisioned by Lockhart. Put in other words, it has not been shown that by allowing the jury which ultimately heard the case to render its verdict, as opposed to a jury that would have passed muster under Batson, that the result of the trial was rendered fundamentally unfair or unreliable. In the absence of such a showing the petitioner has not shown the requisite prejudice as mandated by Strickland. See: Lockhart v. Fretwell, supra.

Petitioner makes reference to counsel's failure to appeal the various rulings of this Court made during the course of jury selection. (petition, pg. 116) The petitioner's claims, in this regard, must fail for two reasons.

First an examination of the record reveals that the rulings of the Court were not erroneous, hence the failure to raise those issues on appeal does not constitute ineffective assistance.

An examination of the voir dire questioning of Ms. Hinton reveals that after initialing indicating that she could not envision a situation in which a life sentence would be an appropriate sentence for the offense of capital murder, the prosecutor and trial judge rehabilitated the venireperson. (T.R. III-131 thru 141) Ultimately the venireperson indicated that she understood the sentencing scheme and would base her verdict only upon the evidence presented. T.R. III-136) She also indicated that despite her personal approval of the death penalty in the abstract, she would nevertheless require the prosecution to prove the special issues beyond a reasonable doubt. (T.R. III-140, 141)

A number of principles are particularly applicable to the petitioner's claim. In reviewing a claim that a trial judge erroneously denied a defendant's challenge for cause a reviewing court is required to give great deference to the trial judge's ruling after reviewing the record as a whole. Satterwhite v. State, 858, S.W.2d 412 (Tex. Crim. App. 1993). In reviewing challenges for cause an appellate court may not reverse the ruling of the trial Court absent a showing that the lower court abused its discretion. Satterwhite v. State, supra. A trial judge does not abuse its discretion by refusing to grant a challenge for cause lodged against a venireperson who vacillates in his/her response to questions. Satterwhite v. State, supra. That is precisely what occurred with respect to Ms. Hinton.

Under the tenets of review outlined above the petitioner has not demonstrated that counsel for petitioner was ineffective for failure to raise this claim on direct appeal.

The same equation applies with equal force to the contentions raised regarding the trial Court's denial of petitioner's challenge for cause on venireperson Sip (T.R. III-321, 322, 323) venireperson Cunningham (T.R. IV-47, 48) and venireperson Zaiontz (T.R. IV-200, 201).

With respect to venireperson Johnson (T.R. IV-351 thru 378) no appealable issue was raised because no challenge for cause was lodged against Johnson. See: Garcia v. State, 887 S.W.2d 862 (Tex. Crim. App. 1994).

The petitioner also complains of trial counsel's decisions during the course of voir dire. Initially he claims that he was denied effective assistance because trial counsel failed to make inquiry of the venirepersons as to whether his race (black) would impact on their deliberations. In the absence of some proof that some of the jurors who ultimately sat on the jury were adversely influenced by racial

considerations this Court will once again engage in a presumption that the jury followed their instructions based on their verdict on the evidence. Stated in the alternative, petitioner has failed to meet his burden of proving that what was not asked of the venire, was not asked for a reason related to the trial counsel's strategic decision making process. The same holds true with respect to counsel's non-uniform use of inquiries regarding the terms intentional and deliberate. Lastly, trial counsel's decision not to exercise a peremptory strike against venireperson Mauricio was inherently one of strategy. (T.R. 111-356)

C.

In his final category of ineffective assistance of counsel the petitioner concludes with a lengthy "laundry list" of purported failure of trial counsel. He claims deficient performance in i) failing to object to the opening statement of the prosecutor, ii) failing to raise on appeal the erroneous admission of extraneous misconduct, iii) failing to raise on appeal the erroneous admission of hearsay, iv) failing to raise on appeal the erroneous use of leading questions, v) failure to object to the violation of rule of sequestration, vi) making a deficient closing argument, vii) failing to object to the prosecutor's closing argument, viii) failure to complain an appeal regarding the denial of certain requested jury instructions, ix) failure to adequately examine and cross-examine witnesses.

Each and every one of these claims is wholly conclusory and not supported by any authority. As a result petitioner has failed in his burden of proof on the first prong of Strickland. Moreover, the petitioner has not argued or demonstrated that these purported failures rendered the proceedings unfair or the result unreliable. As a result, the petitioner has not sustained his burden of proof on the second prong of Strickland.

The petitioner's fourteenth claim for relief is without merit.

Findings Of Fact And
Conclusions Of Law On
Petitioner's Fifteenth Claim For Relief
(Petitioner's Writ Of Habeas Corpus, pg. 121)

In his fifteenth and final point of error Richardson claims that the cumulative effect of the putative errors described in his petition amount to a violation of his right to due process of law.

The Court has reviewed petitioner's claims for relief and found them lacking in merit. An assertion of "cumulative error" presents nothing for this Court on the Court of Criminal Appeals to review. Stoker v. State, 788 S.W.2d 1 (Tex. Crim. App. 1989).

The petitioner's final claim for relief is without merit.

CONCLUSION OF LAW

Applicant has failed to demonstrate any grounds which would entitle him to relief in the form of a post-conviction writ of habeas corpus. It is recommended that this Applicant for habeas corpus relief be denied.

ORDERS OF THE COURT

1) The District Clerk of Bexar County, Texas is hereby ordered to prepare a copy of this. document, together with any attachments and forward the same to the following persons by mail or the most practical means:

a) The Court of Criminal Appeals
Austin, Texas 78711

b) Mr. Steven C. Hilbig
Criminal District Attorney
300 Dolorosa, Suite 5072
Bexar County Justice Center
San Antonio, Texas 78205

c) The Office of Dan Morales
Attorney General of Texas
Enforcement Division
Capitol Station
Austin, Texas 78711

d) Miguel Richardson
Route 6
Huntsville, Texas 77343

e) Daniel M. Lane
1500 NCNB Plaza
300 Convent St.
San Antonio, Texas 78202

f) Steven Rosenfeld
1285 Avenue of the Americas
New York, New York 10019-6064

SIGNED, ORDERED, and DECREED this 1st day of October, 1997.

/s/ Mary Roman
JUDGE MARY ROMAN

CCA Clerks System v.2.0 - Active Files Party # 1 of 5

PDR/Case Number [68,934] Docketed (01/19/82)
Petitioner [APPELLANT]
Style [RICHARDSON, MIGUEL A.]
v [ ]
Offense [CAPITAL MURDER]
[ ] Type [19.03
Punishment [DEATH]
COA Case Number [ ] COA Opinion [
Tr Ct ID Number [320150175] Tr Ct Case # [81-CR-1548]
County [Bexar] Court Name [175TH DISTRICT COURT]
Tr Ct Judge [PRESTON H. DIAL, JR.] Writ [ ]
Contents [TR & SF 6-30-82, A.BR 9-20-82, S.BR 12-6-82, PS.BR 12-27-82]

Code	Name of Party	Person Name	Code
APP	RICHARD,	Rosenfeld, Stephen B.	ATT
APP	MIGUEL A.	Cazier, Allen F.	ATT
DCT		Judge Presiding,	CRT
DCT		Garcia, David J.	DCK
STA		Hilbig, Steven C.	DAT

A)rchive C)ase E)vent M)emo O)pinion P)erson S)ettings R)emarks

Date Printed:
November 28, 1994 Time: 11:43:40
Section 2

Events, Calendars, and Opinion Summary

PDR/Case Number 68,934 Date Filed: 01/19/82
Style: RICHARDSON, MIGUEL A.

Event Date	Post Proc	Event	Descr	Disp	Motion Num	Oral	Disp Code	Remarks 1/Remarks 2
01/19/82		DP BEGIN						
01/19/82		EXT SF FILED	APP					
01/19/82		EXT SF DISP	APP	GRANTED				
06/30/82		TR & SF FILED						
09/20/82		BRIEF FILED	APP					
12/06/82		BRIEF FILED	STA					
12/06/82		SET FOR SUBMIS						
01/26/83		SUBMITTED						
10/28/87		OPINION ISSD		AFFTC			Y	
11/09/87		STAY MANDAT MOT TO	APP	FILED				
11/09/87		REHEAR FILED	APP					
11/25/87		STAY MANDAT MOT TO	APP	GRANTED				MANDATE STAYED FOR 60 DAYS
11/25/87		REHEAR DISP	APP	DENIED			Y	
02/23/88		MANDATE ISSD						
07/05/89		WRIT OF CERT USSC	APP	GRANTED				CERT GRANTED - CASE IS REMANDED TO CCRA FOR FURTHER CONSIDERATION IN LIGHT OF PENRY VS LYNAUGH
08/08/89		EXTRA REMARKS						MANDATE FROM USSC RECD AND FILED
08/15/89		REINSTATED	APP					
08/15/89		SET FOR SUBMIS						
08/15/89		ORDER FILED						A BR DUE 9-15-89, S BR DUE 10-2-89
08/25/89		RESET						CASE IS RESET FOR 1-17-90
01/17/90		SUBMITTED						
06/21/90		EXTRA REMARKS						LTR FROM J BERCHELMAN WITHDRAWING VOLUNTARILY FROM CASE "NOT PARTICIPATING" CERT COPIES OF LTR MAILED TO ATTY, DA, JUDGE
06/12/91		OPINION ISSD		AFFIRM	Y			
06/27/91		REHEAR FILED	APP					
09/18/91		REHEAR DISP	APP	DENIED	Y			
10/10/91		STAY MANDAT MOT TO	APP	FILED				
10/10/91		STAY MANDAT MOT TO	APP	GRANTED				MANDATE IS RECALLED & STAYED UNTIL 12-17-91

Date Printed:
November 28, 1994 Time: 11:43:41
Section 2

Events, Calendars, and Opinion Summary

PDR/Case Number 68,934

Date Filed: 01/19/82

Style: RICHARDSON, MIGUEL A.

Event Date	Post Proc	Event	Descr	Disp	Motion Num	Oral	Disp Code	Remarks 1/Remarks 2
12/18/91		STAY MANDAT MOT TO	APP	FILED				2ND MOT/STAY MANDATE FILED
12/18/91		STAY MANDAT MOT TO	APP	GRANTED				MANDATE STAYED UNTIL DAY OF USSC RULES ON APELLANT'S WRIT OF CERT
12/27/91		WRIT OF CERT USSC	APP	FILED				
06/30/93		WRIT OF CERT USSC	APP	GRANTED				WRIT OF CERT IS GRANTED ON 6-28-93 (IF NO MRH IS FILED - MANDATE WILL ISSUE BY USSC IN ABOUT 25 DAYS)
08/02/93		EXTRA REMARKS						MANDATE FROM USSC - JUDGMENT OF CCRA IS VACATED & THE CASE IS REMANDED TO THE COURT IN LIGHT OF JOHNSON V TEXAS
08/02/93		REINSTATED	APP					
08/19/93		SET FOR SUBMIS			N			NOTICE OF SETTING MAILED TO ALL PARTIES IN LETTER FORM
10/01/93		SUPP BR FILED	STA					
10/11/93		SUPP BR FILED	APP					
10/27/93		SUBMITTED			N			
06/01/94		OPINION ISSD		AFFIRM		Y		
06/21/94		REHEAR FILED	APP					O K TO FILE. GOOD POSTMARK
07/06/94		WORKUP REH COMPLET						
09/21/94		REHEAR DISP	APP	DENIED		Y		
10/06/94		STAY MANDAT MOT TO	APP	FILED				
10/06/94		STAY MANDAT MOT TO	APP	GRANTED				GRANTED FOR 90 DAYS

Calendar	Date Set	Reason Set	Loc	Remarks
MANDAT	12/20/94	MANDATE DUE	CLK	

Event Date	Post Proc	Event	Descr	Disp	Motion Num	Oral	Disp Code	Remarks 1	Remarks 2

Court of Criminal Appeals - Case Opinion

PDR/Case Number 68,934 Opinion Date: 06/01/94

Style: RICHARDSON, MIGUEL A.

Proc: Event: OPINION ISSD Desc.: Disp.: AFFIRM

Disposition Without Written Opinion: N

Author Of Majority Opinion: MJM

Original: N
Granting Rehearing: N Denying Rehearing: N Other: Y

Concurring:
Dissenting: SNC
Concurring & Dissenting:
Not Participating: BV

Per Curiam: N Published: Y West Publishing Cite:

======= Is This The Ruling That DECIDED The Case ? N ==========

Remarks: AFFIRMED ON REMAND FROM THE UNITED STATES SUPREME COURT-
OPINION PRESIDING JUDGE MC CORMICK
(DISSENTING OPINION JUDGE CLINTON)

Court of Criminal Appeals - Case Opinion

PDR/Case Number 68,934 Opinion Date: 10/28/87

Style: RICHARDSON, MIGUEL A.

Proc: Event: OPINION ISSD Desc.: Disp: AFFTC

Disposition Without Written Opinion: N

Author Of Majority Opinion: ---

Original: Y
Granting Rehearing: N Denying Rehearing: N Other: N

Concurring:
Dissenting: SNC
Concurring & Dissenting:
Not Participating: BW

Per Curiam: Y Published: Y West Publishing Cite:

======= Is This The Ruling That DECIDED The Case ? Y ==========

Remarks: DISSENTING OPINION JUDGE CLINTON JOINED BY JUDGES TEAGUE & DUNCAN, JUDGE WHITE NOT PARTICIPATING.

Court of Criminal Appeals - Case Opinion

PDR/Case Number 68,934 Opinion Date: 06/12/91

Style: RICHARDSON, MIGUEL A.

Proc: Event: OPINION ISSD Desc.: Disp.: AFFIRM

Disposition Without Written Opinion: N

Author Of Majority Opinion: MJM

Original: Y

Granting Rehearing: N Denying Rehearing: N Other: N

Concurring: FPB
Dissenting: SHC
Concurring & Dissenting:
Not Participating: SW

Per Curiam: N Published: Y West Publishing Cite:

======= Is This The Ruling That DECIDED The Case ? N ==========

Remarks: AFFIRMED ON REMAND FROM USSC-OPINION PRESIDING JUDGE MCCORMICK (CONCURRING OPINION J. BENAVIDES) (DISSENTING OPINION J. CLINTON JOINED BY J. MALONEY) (J. CAMPBELL CONCURS IN THE RESULT) (J. BAIRD DISSENTS) (JUDGE WHITE NOT